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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN MAYES
Commissioner
GARY PIERCE
Commissioner

Arizona Corporation Commission
DOCKETED
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IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS	**DOCKET NO.** T-01051B-07-0693 T-03608A-07-0693 **NOTICE OF FILING**

On March 27, 2008, the Arizona Corporation Commission ("Commission") issued a Procedural Order instructing Qwest Corporation ("Qwest") to file copies of the Public Utilities Commission's Orders referred to in Footnote 15 of Qwest's Motion of January 28, 2008. Pursuant to the Procedural Order, Qwest hereby files the following state regulatory commission orders:

1. *In re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-139, 2006, Miss. PUC LEXIS 680. Relevant passage underlined on page 18.

2. Louisiana Public Service Commission Ex Parte Consolidated With Bell South Telecommunications Ex Parte, Order Number U-28131; Docket U-28141; Order Number U-28356; Docket Number U-2835; 2006 La. PUC LEXIS 250. Relevant passage underlined on page 2.

RESPECTFULLY SUBMITTED this 3rd day of April, 2008.

QWEST CORPORATION

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16 of 41 DOCUMENTS

IN RE: ORDER ESTABLISHING GENERIC DOCKET TO CONSIDER CHANGE-OF-LAW TO EXISTING INTERCONNECTION AGREEMENTS

DOCKET NO. 2005-AD-139

Mississippi Public Service Commission

2006 Miss. PUC LEXIS 680

October 20, 2006, Dated

PANEL: [*1] NIELSEN COCHRAN, CHAIRMAN; LEONARD BENTZ, VICE CHAIRMAN; BO ROBINSON, COMMISSIONER

OPINION: FINAL ORDER

The Mississippi Public Service Commission ("Commission") established this docket by Order dated March 9, 2005, as a generic proceeding n1 to address various change of law issues arising from several decisions of the Federal Communications Commission ("FCC") and the federal courts. The Commission's March 9, 2005, Order directed the Executive Secretary to notify all certificated competitive local exchange carriers ("CLECs") of this docket and of the opportunity to intervene and participate. Fourteen individual CLECs and two separate organizations representing numerous CLECs filed to intervene. n2 The Commission held an evidentiary hearing on October 26, 2005, and the parties subsequently filed post-hearing briefs and proposed orders. Having carefully reviewed the record in this matter and fully considered the applicable law, and being otherwise fully advised in the premises, including having reviewed and considered the recent decisions by other state commissions in the southeast, the Commission enters this order ruling on the issues that are before the Commission in this proceeding. [*2]

n1 *See,* Order Establishing Generic Docket, 2005-AD-139 (March 9, 2005). *See,* also Amended Order Establishing Procedural Schedule, Docket 2005-AD-139 (June 23, 2005).

n2 Southern Telecommunications Company, LLC, Telepak Networks, Inc., Xfone USA, Inc. d/b/a eXpeTel Communications, CommuniGroup of Jackson, Inc. d/b/a CommuniGroup, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jackson, LLC, KMC Telecom III, LLC ("KMC III"), KMC Telecom V, Inc. ("KMC V"), ITC^DeltaCom Communications, Inc., DixieNet, Megagate Broadband, Inc., XO Communications, Inc., US LEC of Tennessee Inc. ("US LEC"), Southeastern Competitive Carriers Association ("SECCA"), Sprint Communications Company, L.P., and Competitive Carriers of the South, Inc. ("CompSouth") intervened in this docket. KMC III, KMC V, and US LEC withdrew their respective interventions prior to the evidentiary hearing. CompSouth was the only party to present a live witness at the evidentiary hearing.

PROCEDURAL [*3] BACKGROUND

On August 21, 2003, the FCC released its *Triennial Review Order ("TRO"),* n3 in which it modified incumbent local exchange carriers' ("ILECs") unbundling obligations under Section 251 of the federal Telecommunications Act of 1996 ("the Act"). n4 Subsequent orders further clarified the scope of ILECs' Section 251 unbundling obligations. These orders culminated in the permanent unbundling rules the FCC released with its *Triennial Review Remand Order ("TRRO")* on February 4, 2005. n5 The FCC's new rules removed, in many instances, significant unbundling obligations formerly placed on ILECs, and set forth transition periods for carriers to move the embedded base of these former unbundled network elements ("UNEs") to alternative serving arrangements. The *TRRO* explicitly required change of law processes and certain transition periods to be completed by March 10, 2006. n6

n3 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98 and 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003),* corrected by *Errata, 18 FCC Rcd 19020 (2003),* vacated and remanded in part, aff'd in part, *United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), cert. denied, 125 S. Ct. 313 (2004)* (referred to, interchangeably, as the *"Triennial Review Order"* or the *"TRO"*).

[*4]

n4 The *Telecommunications Act of 1996* amended the *Communications Act of 1934, 47 U.S.C. § 151* et seq. References to *"the Act"* refer collectively to these Acts.

n5 *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand,* FCC 04-290 (released February 4, 2005) (referred to, interchangeably, as the *"Triennial Review Remand Order"* or the *"TRRO"*).

n6 *See TRRO,* PP 143, 144, 196, 197, and 227. As noted later herein, all interconnection agreement provisions that are impacted by this Order shall have an effective date as of March 10, 2006.

While some CLECs operating in Mississippi have successfully negotiated the changes necessitated by the *TRO* and the *TRRO,* there are other CLECs with whom discussions continue, and still other CLECs that have not negotiated with BellSouth to modify interconnection agreements to reflect current regulatory policy.

I. Section 271 Related Issues [*5] (Issues 8, 14, 17, 18, 22)

The most contentious, and arguably the most important, issues in this generic docket involve the interplay between Section 271 of the Act and delisted UNEs. n7 BellSouth argues that once an element has been delisted, the FCC has exclusive jurisdiction over BellSouth's provisioning of that element. The CLECs, on the other hand, argue that even after an element has been delisted, Section 271 of the Act requires BellSouth to continue providing that element by way of an interconnection agreement that is subject to the negotiation, arbitration, and approval process set forth in Section 252 of the Act. In deciding the 271 related issues, the Commission has carefully considered the relevant federal statutes, FCC Orders, court decisions n8, and other State commission decisions.

n7 As used in this Order, "delisted UNEs" refers to elements that, as a result of various FCC decisions, BellSouth is no longer required to offer on an unbundled basis under Section 251 of the Act.

n8 The Commission is particularly cognizant of the April 13, 2005, Order issued by the federal court in Mississippi. *See BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al., 368 F.Supp. 2d 557 (S.D. Miss. 2005) ("Mississippi Order").*

[*6]

A. Issue 8(a): *Does the Commission have the Authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?*

Section 271 of the Act addresses BellSouth's authority to provide interLATA services. This section provides, in relevant part, that BellSouth "meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 [of the Act]" n9 The CLECs' rely heavily on this language to support their argument that the negotiation, arbitration, and approval process set forth in Section 252 of the Act applies to delisted UNEs. To resolve the Section 271 related issues, therefore, the Commission must determine what Section 252 of the Act does and does not require in an interconnection agreement.

n9 *47 U.S.C. § 271*(c)(1)(A).

The Commission first notes [*7] that Section 252 makes no reference whatsoever to Section 271 of the Act. n10 Instead, Section 252 of the Act applies when BellSouth "receiv[es] a request for interconnection, services, or network elements pursuant to Section 251 [of the Act]" n11 A State commission is required to approve an interconnection agreement that is reached as a result of negotiations unless the agreement either (1) discriminates against a carrier that is not a party to it; or (2) is not consistent with the public interest, convenience, and necessity. n12 On the other hand, if the Commission is required to arbitrate an interconnection agreement, the Commission must approve the agreement unless it either (1) does not meet the requirements of Section 251 of the Act; or (2) does not meet the standards set forth in Section 252(d) of the Act. n13 Section 252(d), in turn, sets forth pricing standards that apply to: rates for interconnection or network elements required by subsections (c)(2) and (c)(3) of Section 251; n14 BellSouth's compliance with the reciprocal compensation requirements of Section 251(b)(5); n15 and rates for services that are resold pursuant to Section 251(c)(4). n16

n10 The CLECs argue that the fact that Section 252 makes no reference to Section 271 is "immaterial." *See Competitive Carrier's Response to BellSouth's Motion for Summary Judgment or Declaratory Ruling and Competitive Carrier's Cross-Motion for Summary Judgment and Declaratory Ruling* at p. 8. The Commission, however, is not willing to summarily disregard this significant omission.

[*8]

n11 *47 U.S.C. § 252*(a)(1).

n12 *Id.*, § 252(e)(2)(A).

n13 *Id.*, § 252(e)(2)(B).

n14 *Id.*, § 252(d)(1).

n15 *Id.*, § 252(d)(2)(A).

n16 *Id.*, § 252(d)(3).

Section 252 also allows a State commission to review any statement of the terms and conditions BellSouth generally offers ("SGAT") n17 to CLECs that BellSouth may file with a State commission, in order to determine whether the SGAT complies with Section 251. n18 Finally, Section 252 provides that if a State commission fails to carry out its duties under Section 252 and the FCC steps in to fulfill those duties, an aggrieved party may bring an action in the appropriate federal court to determine whether the interconnection agreement or SGAT, approved by the FCC, "meets the requirements of Section 251 and this section." n19 Clearly, Congress limited the Section 252 rate-setting, negotiation, arbitration, and approval process to Section 251 obligations. n20

n17 These statements often are called SGATs, which stands for "statement of generally available terms."

[*9]

n18 *Id.*, § 252(f)(1),(2).

n19 *Id.,* § 252(e)(6).

n20 This conclusion is consistent with the FCC's statement that "[w]here there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to Section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements." *TRO* at P 656 *See also Id. at P657* (stating that this Section "is quite specific in that it only applies for the purposes of implementation of Section 251(c)(3)" and "does not, by its terms" grant the states any authority as to "network elements that are required under Section 271"). It also is consistent with federal court rulings. *See Cosery Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482, 488 (5th Cir. 2003)* ("An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."); *MCI Telecom. Corp. v. BellSouth Telecommunications, Inc., 298 F.3d 1269, 1274 (11th Cir. 2002)* (holding that a requirement that an ILEC like BellSouth negotiate items that are outside of Section 251 is "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.").

[*10]

In sharp contrast to Section 252, which authorizes State commissions to make certain decisions regarding Section 251 elements, Section 271 vests authority to address network elements that are provided pursuant to that section exclusively with the FCC. A Bell operating company ("BOC") like BellSouth, for instance, may apply to the FCC for authorization to provide long distance services, and the FCC has exclusive authority for "approving or denying" that authority. n21 Similarly, once a BOC like BellSouth obtains Section 271 authority (as BellSouth has done in Mississippi), continuing enforcement of Section 271 obligations rests solely with the FCC under Section 271(d)(6)(A) of the Act. The plain language that Congress used in the Act, therefore, demonstrates that elements that BellSouth is required to offer pursuant to Section 251 of the Act are subject to the Section 252 process. In contrast, elements that BellSouth is not required to offer pursuant to Section 251, but that it is required to offer pursuant to Section 271, are subject to the exclusive jurisdiction of the FCC.

n21 *47 U.S.C. § 271*(d)(1),(3).

[*11]

This conclusion is buttressed by the plain language of various FCC Orders. When the FCC first addressed the interplay between Section 251(c) and the competitive checklist network elements of Section 271 in its *UNE Remand Order,* the FCC made it clear that "the prices, terms, and conditions set forth under Sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of Section 271." n22 Instead, the FCC stated that:

> [I]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a). n23

Subsequently, in its *TRO,* the FCC made it clear that the prices, terms, and conditions of Section 271 checklist item elements, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6). In that Order, the FCC **[*12]** stated that "[i]n the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271" n24 In the FCC's words, it is the FCC that has "exclusive authority" over the entire "Section 271 process." n25 Clearly, the FCC refused to graft the requirements of Sections 251 and 252 onto Section 271 in its *TRO.* The D.C. Circuit Court of Appeals upheld this decision, characterizing the CLEC's suggested cross-application of Section 251 to Section 271 as "erroneous." n26 Moreover, in the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BellSouth's compliance with Section 271. n27

n22 *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, P 469 (1999) ("UNE Remand Order"), petitions for review granted, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).*

[*13]

n23 *UNE Remand Order* at P470.

n24 *TRO* at P 665. *See also TRO* at P 663. ("The Supreme Court has held that the last sentence of Section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

n25 Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, 14 FCC Rcd 14392, 14401-02, P 18 (1999).*

n26 *United States Telecom. Ass'n v. FCC, 359 F.3d 554, 590 (D.C. Cir 2004).*

n27 *See SBC Communications Inc. v. FCC, 138 F.3d 410, 416-17 (D.C. Cir. 1998).*

The FCC also has held that the rates for Section 271 elements are subject to the standard set **[*14]** forth in Sections 201 and 202 of the Act, and these sections are applied and enforced by the FCC. n28 Section 201, for instance, speaks in terms of "just and reasonable" rates, and those are determinations that "Congress has placed squarely in the hands of the [FCC]." n29 As the D.C. Circuit has noted, Sections 201 and 202 "authorize the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory." n30

n28 *See TRO* at P664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake ...."); also *TRO* at P 665 ("In the event a BOC has already received Section 271 authorization, Section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271.").

n29 *In Re: Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987)* (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc., 449 U.S. 609, 612 (1981)); see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co., 919 F. Supp. 472, 478 (D. D.C. 1996)* (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd., 99 F.3d 448 (D.C. Cir. 1996).*

[*15]

n30 *Competitive Telecommunications Association v. FCC, 87 F.3d 522,* (D.C. Cir. 1996). The idea of FCC regulation of local telephone service under Sections 201 and 202 is neither problematic nor novel, given that the Supreme Court has determined that Congress "unquestionably" took "regulation of local telecommunications competition away from the States" on all "matters addressed by the 1996 Act" and required that State commission regulation be guided by FCC regulations. *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 378 n. 6*

(1999); Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission, 359 F.3d 493 (7th Cir. 2004).

In light of this authority, at least three federal courts have found that it is not appropriate to address Section 271 issues in the context of the Section 252 arbitration process. First, on appeal from a decision made by this Commission on the "new adds" issue, is the decision by the United States District Court in Mississippi, where the Court explained:

> Certain **[*16]** of the intervenors ... argue that BellSouth 'still has to provide [UNE-Platform] under Section 271, regardless of the elimination of [the UNE-Platform] under Section 251.' The New York Public Utilities Commission considered a similar argument by competitive LECs ... The Commission rejected the argument, noting that in light of the FCC's decision 'to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [was] clear that there is no federal right to 271-based UNE-P arrangements.' This court would tend to agree. It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may (i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company ... or (iii) suspend or revoke such company's approval to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged **[*17]** failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service. n31

Similarly, the United States District Court in Kentucky confirmed that:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first. n32

Finally, a federal district court in Montana has held that Section 252 did not authorize a State commission even to approve a negotiated agreement for line sharing between Qwest and Covad. The federal court reasoned that Section 252 did not apply to this "commercial agreement" because line sharing "is not an element or service that must be provided under Section 251." n33 If Section 252 does not allow a State commission to even approve a negotiated agreement that does not involve Section 251 items, it certainly does not allow a State commission to arbitrate terms that are not mandated by Section 251.

n31 *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al., 368 F.Supp. 2d 557, 565-566 (S.D. Miss. 2005).*

[*18]

n32 *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order,* (E.D. Ky. Apr. 22, 2005) ("*Kentucky Order*"), p. 12 of slip opinion; The foregoing decisions are consistent with *Indiana Bell v. Indiana Utility Regulatory Com'n et al., 359 F.3d 493, 497 (7th Cir. 2004)* ("*Indiana Bell*"), in which the Seventh Circuit described a State commission's role under Section 271 as "limited" to "issuing a recommendation." Consequently, when the Indiana Commission attempted to "parlay its limited role in issuing a recommendation under Section 271" into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service, the Seventh Circuit preempted that attempt.

n33 *Qwest Corp. v. Schneider, et al., 2005 U.S. Dist. LEXIS 17110,* CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).

The Commission also notes that several State commissions have concluded, in some form or fashion, that the FCC, rather than State commissions, **[*19]** is charged with Section 271 oversight. n34 Although the Georgia Commission determined that it does have jurisdiction to set rates for Section 271 elements, n35 the Florida, Louisiana, North Carolina, and South Carolina Commissions all ruled that state commissions do not have authority to require BellSouth to include Section 271 elements in Section 252 interconnection agreements. n36 These decisions are consistent not only with applicable federal law, but also with sound public policy. The FCC and the courts undeniably have found that overbroad unbundling obligations have hindered the innovation and investment that results from sustainable facilities-based competition. n37 It would be exceedingly odd for all of the FCC's decisions, deliberations, and conclusions about the adverse impact of the delisted UNEs on competition under Section 251 of the Act to be rendered moot by allowing CLECs to obtain the exact same arrangements, pursuant to Section 271 of the very same act. This Commission agrees with the majority of the state commissions and finds that it does not have authority to require BellSouth to include Section 271 elements in Section 252 interconnection agreements.

n34 *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005), *2005 Wash. UTC LEXIS 54; In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16; In re: Petition for Arbitration of Covad with Qwest, Iowa Utilities Board,* Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186;* Order No. 29825; *2005 Ida. PUC LEXIS 139; In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TCO5-056 (July 26, 2005), *2005 S.D. PUC LEXIS 13; In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; *Docket No. P-00042092, 2005 Pa. PUC LEXIS 9* (June 10, 2005); *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005); Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 on July 18, 2005; Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2004) ("Texas Order"); July 28, 2005 order in Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18; Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U; November 9, 2005 *Arbitration Order,* Case No. 05-0887-TP-UNC, Ohio Public Service Commission, at p. 27; *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief,* Alabama Public Service Commission Docket No. 29393 (May 25, 2005) ("May 25, 2005 Order"), at p. 18; *Order Concerning New Adds,* North Carolina Utilities Commission, Docket No. P-55, Sub 1550, April 25, 2005, at p. 13; *See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's TRO on Remand,* New York Public Service Commission Case No. 05-C-0203 (March 16, 2005).

[*20]

n35 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006). The Commission notes that this Order and other related Orders issued by the Georgia Commission have been appealed to federal court.

n36 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); Louisiana Public Service Commission Docket No. U-28131 consolidated with Docket No. U-28356 (February 22, 2006); North Carolina Utilities Commission Docket P- 55, Sub 1549 (March 1, 2006) (The Commission also notes that BellSouth has filed for reconsideration with the North Carolina Commission of some aspects of that Commission's ruling.); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n37 *See, e.g., TRRO* PP 2, 8 (*citing to United States Telecom Ass'n v. FCC, 290 F.2d 415, 418-21 (D.C. Circ. 2002) ("USTA I").*

For all of the reasons set forth above, the Commission concludes that the answer to this question presented by Issue 8(a) is "no". The Commission, therefore, finds that unless a CLEC and BellSouth **[*21]** negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi. Appendix A was admitted into evidence as an exhibit to the prefiled testimony of BellSouth witness Pamela A. Tipton.

B. Issue 8(b): Section 271 and State Law: *If the answer to part (a) is affirmative in any respect, does the Commission have the Authority to establish rates for such elements?*

Given that the Commission has answered part (a) in the negative, this issue is moot. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

C. Issue 8(c): Section 271 *If the answer to 8(a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements; and (ii)* **[*22]** *what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?*

Given that the Commission has answered 8(a) and (b) in the negative, this issue is moot.

The Commission, therefore, finds that the contract language it has ordered with respect to Issue 8(a) above is sufficient to address this issue. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

D. Issue 14: Commingling: *What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?*

The FCC defines "commingling" as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent **[*23]** LEC, or the combining of an unbundled network element, or a combination of unbundled network elements with one or more such facilities or services." n38 The CLECs argue that this rule allows them to purchase a UNE under Section 251 (a loop, for instance), "commingle" it with an element they purchase under Section 271 (switching, for instance), and pay a rate that is established under the Section 252 process for that "commingled" offering. In the context of a loop and a port, this would allow CLECs to continue purchasing the loop-port combination that formerly was called the UNE-P pursuant to interconnection agreements that are subject to the Section 252 process, even though the FCC has found that the UNE-P harms competition and that CLECs are not impaired in their ability to obtain switching ports from other sources. For the reasons set forth below, the Commission finds that the CLECs' arguments are without merit.

n38 *47 C.F.R. § 51.5*

First, as explained above, the Commission finds **[*24]** that the FCC has exclusive jurisdiction over elements that BellSouth is required to provide under Section 271. Even if that were not the case, however, a careful review of controlling authority demonstrates that BellSouth has no obligation to commingle Section 251 items with Section 271 items. Although the FCC enacted its federal commingling rule in connection with the *TRO,* the term "commingling" was first used in the FCC's *Supplemental Order on Clarification ("SOC").* n39 There, the FCC discussed commingling as combining loops or loop-transport combinations with tariffed special access services.

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. n40

By using the phrase "i.e.", which commonly means, "that is", the FCC in the *SOC* understood commingling as referring to a service combination that expressly included tariffed access services.

n39 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 9587, P28 (2000),* aff'd sub nom. *Comptel v. FCC, 309 F.2d 3 (D.C. Cir. 2002).*

[*25]

n40 *SOC* at. P 28

The FCC's discussion of commingling in the *TRO* was ultimately consistent with its discussion in the *SOC* as explained more fully below. In the *TRO,* the FCC explained that commingling meant:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. n41

Thus, contrary to the CLECs' argument that there is a distinction between an ILEC's commingling obligation and the combination obligation, n42 the FCC used the terms interchangeably.

n41 *TRO,* P 579.

n42 *See* Gillian Direct at pp. 49-51.

The FCC very clearly "decline[d] to require BOCs, pursuant to Section 271, to combine network elements **[*26]** that no longer are required to be unbundled under Section 251." n43 This aspect of the FCC's ruling was upheld on appeal, and the appellate court explained that the FCC had "decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements." n44

n43 *See TRO* at P 655, n. 1989. The *TRO,* as originally issued, had this language at note 1990. After the *TRO Errata* the footnotes were renumbered, and the language appears at note 1989.

n44 *USTA II, 359 F.3d at 589.* Significantly, the Section 271 checklist obligates BellSouth to provide local loop transmission *"unbundled from local switching and other services",* local transport *"unbundled from switching or other services",* and switching *"unbundled from transport, local loop transmission or other services." See 47 U.S.C. § 271*(c)(2)(B)(iv)-(vi).

This conclusion is clear from the history of the language **[*27]** that appears in the *TRO.* As originally issued, the FCC's *TRO* stated:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements *unbundled pursuant to Section 271* and any services offered for resale pursuant to Section 251(c)(4) of the Act. n45

Had this language remained intact, the CLECs' argument might have merit. The FCC, however, subsequently issued an *Errata* deleting the phrase "unbundled pursuant to Section 271" from this sentence. n46 Thus, the language of the *TRO,* as corrected by the *Errata,* requires:

> Incumbent LECs [to] permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements and any services offered for resale pursuant to Section 251(c)(4) of the Act.

Clearly, ILECs like BellSouth are not required to commingle UNEs with elements that are unbundled pursuant to Section 271.

> n45 *TRO* at P 584 (emphasis supplied).
>
> n46 *TRO Errata, 18 FCC Rcd 19020 P27 (2003).*

[*28]

The Commission notes that at the same time the FCC deleted the phrase "unbundled pursuant to Section 271" from its discussion of commingling in paragraph 584 of the *TRO,* it also deleted the sentence, "We also decline to apply our commingling rule, as set forth in Part VII.A., above, to services that must be offered pursuant to these checklist items" from its discussion in the Section 271 portion of the *TRO.* n47 The CLECs argue that, when read together, the two deletions were intended to correct any potential conflict. The Commission does not agree. Had the FCC desired to impose some type of commingling or combining obligation on BellSouth, it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That, however, is not what the FCC did.

> n47 *See TRO,* n. 1989 (prior to the *TRO Errata,* this was footnote 1990).

Ultimately, by making **[*29]** its deletions, the federal commingling rule issued by the *TRO* became entirely consistent with the discussion of commingling in the *SOC,* because the words wholesale services are repeatedly referred to as tariffed access services. Although the CLECs argue that wholesale services must include Section 271 obligations, the FCC clearly intended to limit the types of wholesale services that are subject to commingling. In describing wholesale services in the *TRO,* the FCC referred only to tariffed access services, just as it had in the *SOC,* explaining, in relevant part, as follows.

First:

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.,* switched and special access services offered pursuant to tariff).

Next:

> Competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.,* switched and special access services offered pursuant to tariff).

Third:

> We do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.,* a ... circuit **[*30]** at rates based on special access services and UNEs).

Then:

> We require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.

Finally:

> Commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services. n48

n48 *TRO at* PP 579 - 581, 583.

The foregoing passages, along with the deletion of Section 271 in the description of commingling in the *Errata,* show clearly that the FCC never intended to require ILECs to commingle Section 271 elements with Section 251 UNEs. Moreover, language within the *TRRO,* read in conjunction with the *TRO,* is consistent with this conclusion. In addressing conversion rights in the *TRO,* the FCC referred to "wholesale services", concluding: "Carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs **[*31]** and UNE combinations" n49 Then, when describing this conversion holding in the *TRRO,* the FCC explicitly limited its discussion to the conversion of tariffed services to UNEs: "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC services to UNEs and LINE combinations" n50 Clearly, the FCC narrowly interprets "wholesale services" as limited to tariffed services, and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements. This conclusion is consistent with decisions of the Mississippi federal district court, n51 the Kansas Commission, n52 the New York Commission, n53 the North Carolina Commission, n54 the Florida Commission, n55 and the Ohio Commission. n56 The Florida, Tennessee, and South Carolina Commissions have all ruled that BellSouth is not required to commingle Section 251 UNEs with elements provided under Section 271. n57 The Georgia Commission and the North Carolina Commission to a lesser extent, however, have ruled that commingling such elements is required. n58 This Commission will follow the majority view in holding that BellSouth is not required to commingle Section **[*32]** 251 UNEs with Section 271 elements.

n49 *TRO* at P 585 (emphasis supplied).

n50 *TRRO* at P 229 (emphasis supplied).

n51 *BellSouth v. Mississippi Public Serv. Comm'n, 368 F.Supp. 2d at 565* (stating that the court would agree with the New York Commission's findings that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it clear that there is no federal right to 271-based UNE-P arrangements.'") (quoting.)

n52 *See Kansas Order* at PP 13-14 (ruling: (1) Southwestern Bell Texas ("SWBT") was "not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had no home in [interconnection] agreements"; and (3) if it ordered SWBT to provide commingling and SWBT refused the commission "would have no enforcement authority against SWBT because that authority resides with the FCC.").

n53 *Order Implementing TRRO Changes,* Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005).

n54 *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24. ("The Commission believes that ... the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.")

[*33]

n55 FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005)("The FCC's errata to the TRO struck the portion of paragraph 584 referring to '... any network elements unbundled pursuant to Section 271 ....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271.").

n56 *Arbitration Order,* Ohio Case No. 05-0887-TP-UNC at 104 (Nov. 9, 2005) ("the FCC concluded, in footnote 1990 of the *TRO,* that § 271 checklist items that are not UNEs under § 251(c)(3) are not subject to the UNE combination requirements and, in fact in § 271 of the 1996 Act there is no mention of 'combining' and it does not reference back to the combination requirement set forth in § 251(c)(3). Applying the same analysis as applied by the FCC to reach its conclusion not to require combinations of checklist items, we decline to require the commingling of § 271 competitive checklist items with other wholesale services, including but not limited to UNEs. We find that the CLECs in their arguments failed to demonstrate how a combination, which is clearly not required per *TRO* footnote 1990, would be different from a commingled arrangement, as proposed by the CLECs.")

[*34]

n57 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006) and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n58 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission, therefore, finds that BellSouth is not obligated to commingle UNEs that are required by Section 251 with items it is required to offer pursuant to Section 271. The Commission finds that the CLECs' proposed contractual language is inconsistent with this finding and that BellSouth's proposed contractual language is consistent with this finding. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.11, shall be included in all interconnection agreements between BellSouth **[*35]** and CLECs operating in Mississippi.

E. Issue 17: Line Sharing: *Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?*

"Line sharing" occurs when a CLEC provides digital subscriber line ("DSL") service over the same line that BellSouth uses to provide voice service to a particular end user, with BellSouth using the low frequency portion of the loop

and the CLEC using the high frequency portion of the same loop. n59 The CLECs argue that line sharing is a Section 271 obligation, and BellSouth disagrees. Significantly, there are no line sharing arrangements between BellSouth and any CLEC in Mississippi, and while CompSouth's witness filed contract language addressing the issue, he acknowledges he did not sponsor any testimony to support his proposed contract language. n60

n59 *See TRO* at P255.

n60 *See* Hearing Exhibit No. 15 (Gillan Deposition) at p.77.

BellSouth contends that the FCC has made it quite **[*36]** clear that BellSouth has no obligation to provide new line sharing arrangements after October 1, 2004. BellSouth asks the Commission to implement this aspect of the *TRO* and require CLECs to eliminate line sharing from their interconnection agreements in Mississippi. As a result, BellSouth explains that to the extent a CLEC has a region wide agreement and has line sharing arrangements in place, it would need to include language that implements the *TRO's* binding transition mechanism for access to the high frequency portion of the loop ("HFPL"). The Commission finds that BellSouth's request is both reasonable and appropriate.

The CLECs' argument that line sharing is a Section 271 obligation fails for several reasons. First, the plain language of Section 271 does not require line-sharing. Checklist item 4 requires BOCs to offer "local loop transmission, unbundled from local switching and other services." n61 Clearly, when line sharing occurs, transmission, local switching, and other services are being provided. n62 Consequently, requiring line sharing as a Section 271 element would conflict with the statutory language.

n61 *47 U.S.C. § 271*(c)(2)(B)(iv).

[*37]

n62 *See,* e.g., *TRO* at P255 (explaining that the end user in a line sharing arrangement is receiving both voice and DSL service over the same facility).

Moreover, the FCC has authoritatively defined the "local loop" as a specific "transmission facility" between a LEC central office and the demarcation point on a customer premises. n63 BellSouth thus meets its checklist item 4 obligations by offering access to unbundled loops and the "transmission" capability on those facilities. n64 The Commission rejects the CLECs' argument that because the HFPL is "a complete transmission path," it somehow constitutes "a form of loop transmission facility'" under checklist item 4. This argument ignores the portion of the definition of HFPL that defines HFPL as a "complete transmission path on the frequency range above the one used to carry analog circuit switched voice transmissions" n65 In other words, the HFPL is only part of the facility -- not the entire "transmission path" required by checklist item 4. n66

n63 *47 C.F.R. § 51.319(a).*

[*38]

n64 The CLECs cite to FCC 271 orders for the proposition that line sharing is a Section 271 obligation. *See In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, 15 FCC Rcd 3953* (Dec. 22, 1999); *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, 15 FCC Rec'd 18354 (June 30, 2000). However, neither Bell Atlantic (now Verizon) in New York nor SBC in Texas were required to offer line sharing to obtain Section 271 approval. If line sharing actually had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted Verizon and SBC Section 271 authority.

n65 *TRO* at P 268.

n66 A simple but appropriate analogy makes the point -- it is as if one ordered a birthday cake from a bakery but received only the icing. Certainly, the buyer would not consider the icing alone a "form" of birthday cake. On the contrary, the requirement was a whole cake, not just a portion of it, just as checklist item 4 requires the entire transmission facility, not just the high frequency portion of the transmission facility.

[*39]

The CLECs further argue that despite the clear language of the FCC in its *TRO,* they can obtain the HFPL indefinitely, and at rates other than the ones the FCC specifically established in its transition plan, simply by requesting access to those facilities under Section 271 instead of Section 251. This position is inconsistent with both the statutory scheme and the FCC's binding decisions. First, if for no other reason, the CLECs' argument must fail for the same reason that it fails in response to Issue 8(a).

Second, the CLECs' argument would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from the use of line-sharing and to transition them to other means of accessing BellSouth's facilities (such as access to whole loops and line-splitting) that do not have the same anti-competitive effects that the FCC concluded are created by line-sharing. As the FCC explained, "access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives." n67 Indeed, the FCC expressly found continued unlimited access to line-sharing to be anticompetitive and contrary to the core goals of the Act, **[*40]** because it would:

> likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets. n68

The Commission does not believe that the FCC would have carefully eliminated these anti-competitive consequences under Section 251, only to allow them to continue unchecked under Section 271. On the contrary, subsequent FCC orders confirm that it continues to believe that it has required CLECs, in lieu of line sharing, to obtain a whole loop or engage in line-splitting. Thus, in its very recent *BellSouth Declaratory Ruling Order,* n69 the FCC again stressed that, under its rules, "a competitive LEC officially leases the entire loop." n70 Moreover, far from suggesting an open-ended Section 271 obligation to allow line-sharing, this very recent FCC decision reiterates that line sharing was required "only under an express three-year phase out plan." n71 The FCC's statement cannot be squared with the notion that line-sharing **[*41]** is also required indefinitely under Section 271. Finally, even if Section 271 somehow did require line-sharing, the Commission adopts the analysis which demonstrates that the FCC's recent forbearance decision n72 would have removed any such obligation.

n67 *TRO* at P 260.

n68 *Id.* at P 261.

n69 *See Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830* WC Docket No. 03-251 (Mar. 25, 2005) ("*BellSouth Declaratory Ruling Order*").

n70 (P 35).

n71 *Id.* at P 5 n. 10.

n72 *Memorandum Opinion and Order, 19 FCC Rcd 21496* WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*").

Therefore, the Commission finds that Section 271 does not require BellSouth to provide line sharing. This decision is consistent with decisions of the Tennessee, n73 Massachusetts, n74 Michigan, n75 Rhode Island, n76 and Illinois Commissions. n77 The Florida and South Carolina Commissions **[*42]** have also ruled in their change of law proceedings that BellSouth is not obligated to provide line sharing. n78 The Georgia Commission again ruled in the minority, holding that BellSouth is still required to provide line sharing, and it set a rate of $ 6.50. n79 In North Carolina, DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") filed a Motion for Partial Stay of the Commission's Order Concerning Changes of Law with respect to line sharing, while Covad petitioned the FCC regarding the issue. The North Carolina Commission denied Covad's Motion for Stay, ruling that line sharing is no longer a Section 251 UNE, except insofar as the provision of the FCC's transitional plan applies to existing customers. The North Carolina Commission also ruled that the issue of line sharing should be before the FCC and not the state commission and directed Covad to present its arguments at the federal level. n80 This Commission finds consistent with the majority of commissions that BellSouth is not required to provide line sharing. The Commission further finds that the CLECs' proposed contractual language is inconsistent with this decision and that BellSouth's proposed contractual **[*43]** language is consistent with it. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix B to this Order, including without limitation Section 3.1.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

n73 Docket No. 04-00186, Order dated July 20, 2005.

n74 *Massachusetts Arbitration Order,* p. 185.

n75 *In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief 2005 Mich. PSC LEXIS 109,* Order Dismissing Complaint * 12-13 (Mar. 29, 2005).

n76 *Report and Order, 2004 R.I. PUC LEXIS 31, In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18,* Rhode Island Public Utilities Commission, Docket No. 35556 (October 12, 2004).

n77 *In re: XO Illinois, 2004 WL 3050537* (Ill. C.C. Oct. 28, 2004).

[*44]

n78 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n79 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

n80 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 23, 2006)

F. Issue 18: Line Sharing -- Transition: *If the answer to Issue 17 is negative, what is the appropriate language for transitioning off a CLEC's existing line sharing arrangements?*

Having answered Issue 17 in the negative, the Commission finds that the FCC clearly articulated the transitional plan for line sharing at paragraph 265 of the *TRO:*

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state- approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for **[*45]** stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary.

BellSouth has no obligation to add new line sharing arrangements **[*46]** after October 2004. The North Carolina Utilities Commission concluded that interconnection agreements should only contain language for line sharing while transitioning from CLEC's existing Section 251 line sharing arrangements. n81 The South Carolina Commission concluded that unless a CLEC and BellSouth had negotiated different language, BellSouth's proposed language shall be included in interconnection agreements. n82 This Commission agrees with the conclusion of the South Carolina Commission. Accordingly, it is appropriate to properly transition existing line sharing arrangements to other arrangements.

n81 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n82 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

Accordingly, the Commission finds that Mississippi CLECs with region wide interconnection agreements and that have line sharing customers must amend their interconnection agreements to incorporate both the line sharing transition plan contained **[*47]** in the federal rules and language that requires CLECs to pay the stand-alone loop rate for arrangements added after October 1, 2004. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language and rates addressing this issue as set forth in Appendix B and C to this Order shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi. Appendices B and C were admitted into evidence as exhibits to the prefiled testimony of BellSouth witness Eric Fogle.

G. Issue 22: Call Related Databases: *What is the appropriate ICA language, if any, to address access to call related databases?*

Pursuant to the *TRO,* BellSouth is not obligated to unbundle call-related databases for CLECs who deploy their own switches. n83 The FCC's rules require BellSouth to provide access to signaling, call-related databases, and shared transport facilities on an unbundled basis only to the extent that local circuit switching is unbundled. n84 This decision applies on a nationwide basis, both to enterprise and mass-market switching. n85 Consequently, interconnection agreements should not contain **[*48]** any language regarding the provision of unbundled access to call-related databases other than 911 and E911.

n83 *TRO* at P 551 ("[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below").

n84 *47 C.F.R. 51.319(d)(4)(i).*

n85 *TRO* at P 552.

The D.C. Circuit affirmed the FCC's decision on call-related databases. On appeal, the CLECs argued that the only reason that alternatives existed to ILEC databases was because the FCC had previously ordered access to such databases. n86 The Court rejected this argument and held that "[a]s it stands, CLECs evidently have adequate access to call-related databases. If subsequent developments alter this situation, affected parties may petition the [FCC] to amend its rule." n87 Because CLECs no longer have access to unbundled switching, CLECs have no unbundled access to call-related **[*49]** databases. BellSouth's legal obligation is expressly limited to providing databases only in connection with switching provided under the FCC's transition plan.

n86 *USTA II* at 587.

n87 *Id.* at 587-88.

The CLECs argue that BellSouth must include language concerning Section 271 access to call-related databases in its interconnection agreements. n88 As noted above, however, the FCC has exclusive Section 271 authority. Moreover, it is unreasonable to assume that the FCC and D.C. Circuit eliminated unbundling requirements for databases only to have such obligations resurrected through Section 271. The Florida Commission determined that BellSouth is obligated to offer all CLECs unbundled access to 911 and E911 call-related databases. n89 The commissions in Georgia and Tennessee have ordered that BellSouth must provide call-related databases at just and reasonable rates. n90 The North Carolina Commission concluded that it does not have authority to require BellSouth to include call-related databases in Section 252 **[*50]** interconnection agreements. n91 The South Carolina Commission similarly ruled that unless a CLEC and BellSouth had negotiated different language, BellSouth's proposed language shall be included in interconnection agreements. n92 This Commission agrees, and concludes that BellSouth's proposed language is appropriate.

n88 Revised Exhibit JPG-1 at p. 50.

n89 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

n90 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and Tennessee Regulatory Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

n91 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n92 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

BellSouth's proposed contract language concerning callrelated databases appropriately ties BellSouth's obligation to provide unbundled access to call related databases to BellSouth's limited obligation to provide switching **[*51]** or UNE-P. n93 The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 7, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

n93 *See* PAT-1, Section 7.1; Tipton Direct at pp. 62-63.

II. Transition Issues (2, 3, 4, 5, 9, 10, 11., 32)

The overriding disputes between BellSouth and the CLECs concerning the FCC's transition plan include establishing contract language for an orderly transition and determining whether CLECs can pay UNE rates after they have mi-

grated from Section 251 UNEs to other serving arrangements. n94 In addition, the CLECs seek contract language that would allow them to transition from Section 251 UNEs to Section 271 checklist items.

n94 In addition to these disputes, BellSouth and the CLECs dispute which wire centers in Mississippi are not impaired pursuant to the FCC's impairment tests. We will address which wire centers satisfy the FCC's test in connection with Issue 5, and we will discuss the appropriate fiber-based collocation definition in our discussion of Issue 4.

[*52]

A. Issue 2: TRRO Transition Plan *What is the appropriate language to implement the FCC 's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?*

Based on the FCC's rulings, the Commission finds that CLECs should not have waited until the eleventh hour to work cooperatively with BellSouth to establish an orderly transition. The FCC has stated that the transition timeframes it established provide: (1) adequate time to perform "the tasks necessary to an orderly transition"; n95 and (2) "the time necessary to migrate to alternative fiber arrangements." n96 The Commission further finds that once CLECs have migrated from UNEs to alternative serving arrangements, the rates, terms, and conditions of such alternatives apply. The *TRRO* specifically states that the transition rates will apply only while the CLEC is leasing the delisted element from the ILEC during the relevant transition period. n97 The Commission finds that all interconnection agreements impacted by this Order shall be effective as of March 10, 2006, and CLECs will have fourteen (14) days from the date of this Order in which **[*53]** to appropriately convert any remaining former UNEs with BellSouth. If CLECs fail to do so, BellSouth shall be authorized to make the conversions subject to applicable nonrecurring charges. The transition rates will apply during the time the former UNEs were leased from BellSouth and will end no later than March 10, 2006 (or September 10, 2006, for dark fiber). BellSouth will be entitled to the rates applicable to alternative arrangements ordered by impacted CLECs, retroactive to March 11, 2006.

n95 *TRRO* at P 143 (DS1/3 transport); P 196 (DS1/3 loops); P 227 (local switching).

n96 *TRRO* at P 144 (dark fiber transport); P 198 (dark fiber loops). Tipton Direct at pp. 5-6.

n97 *See TRRO* at PP 145, 198 and 228.

1. Local Switching and UNE-P

In establishing transitional language, the Commission will require CLECs to identify their embedded base via spreadsheets and submit orders as soon as possible, but in no event more than 15 days after the date of this Order, to convert or disconnect their embedded **[*54]** base of UNE-P or standalone local switching. n98 This will give BellSouth time to work with each CLEC to ensure all embedded base elements are identified, negotiate project timelines, issue and process service orders, update billing records, and perform all necessary cutovers. If a CLEC fails to submit orders to convert UNE-P lines to alternative arrangements in a timeframe that allows the orders to be completed within fourteen (14) days after the effective date of this Order,then BellSouth is authorized to convert any such remaining UNE-P lines to the resale equivalent beginning 14 days after the effective date of this Order. For any remaining stand-alone switch ports, BellSouth is authorized to disconnect these arrangements beginning 14 days after the effective date of this Order, as there is no other tariff or wholesale alternative for stand-alone switch ports. Resale rates, if applicable, shall not apply as of March 11, 2006.

n98 This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

[*55]

The Commission finds that the transition plan also must include the transitional rates contained in the FCC's rules. n99 These rules make clear that transitional switching rates would be determined based on the higher of the rate the

CLEC paid for that element or combinations of elements on June 15, 2004, or the rate the State commission ordered for that element or combination of elements between June 16, 2004, and the effective date of the *TRRO.* n100 In most, if not all instances, the transitional rate will be the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the transitional additive ($ 1 for UNE-P/Local Switching). For UNE-P, this includes those circuits priced at market rates for the FCC's four or more line carve-out established in the *UNE Remand Order* and affirmed in the *TRO,* n. 1376. To the extent that contracts include a market based price for switching for "enterprise" customers served by DSO level switching that met the FCC's four or more line carve-out, these terms and rates were included in the interconnection agreements and were in effect on June 15, 2004. n101

n99 *See 47 C.F.R. 51.319(d)(2)(iii).*

[*56]

n100 Tipton Rebuttal at p. 6.

n101 Although BellSouth has the legal right to the transitional additive in addition to the rate in existing interconnection agreements ((Tipton Rebuttal at 6); *47 C.F.R. § 51.319(d)(2)(iii)*), BellSouth has elected not to apply the additional $ 1 to previously established market rates for switching.

The Commission rejects the CLECs' suggestion that TELRIC rates plus $ 1 apply to such customers, as the FCC was very clear that for the embedded base of UNE-Ps, the CLECs would pay either the higher of the rates that were in their contracts as of June 15, 2004, or the rates that the State commissions had established between June 16, 2004, and the effective date of the TRRO, plus $ 1. n102 The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 4.2, 4.4.2, and 5.4, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi. **[*57]**

n102 Id.

2. DS1 and DS3 High Capacity Loops and Dedicated Transport

For unimpaired wire centers where the FCC's competitive thresholds are met n103 or impaired wire centers where the FCC's caps apply, n104 the Commission will require CLECs to submit spreadsheets as soon as possible, but in no event more than 15 days after the date of this Order, identifying the embedded base and excess DS1 and DS3 loops and transport circuits to be disconnected or converted to other BellSouth services. n105

n103 The identification and discussion of the wire centers that satisfy the FCC's competitive thresholds is addressed in relation to Issue 4.

n104 BellSouth and other active parties have agreed that the DS1 transport cap applies to routes for which there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport.

n105 This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

[*58]

If a CLEC does not provide notice in a timely manner to accomplish orderly conversions within fourteen (14) days after the effective date of this Order, then BellSouth is authorized to convert any such remaining embedded or excess high capacity loops and interoffice transport to the corresponding tariff service offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this

issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.4 and 6.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

3. Dark Fiber Loops and Dedicated Transport

The Commission will require CLECs to submit spreadsheets to identify their embedded base dark fiber to be either disconnected or converted to other services within 15 days after the date of this Order. n106 If CLECs do not submit orders in a timely manner so that conversions can be completed within 15 days after the date of this Order, BellSouth is authorized to convert any remaining dark fiber loops or embedded base dark fiber transport to corresponding tariff service **[*59]** offerings. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.8.4 and 6.9.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

n106 This deadline applies unless a CLEC and BellSouth agree to a different time frame.

4. Transition Rates, Term, and Conditions

The Commission finds that it is appropriate to take steps in addition to requiring CLECs to identify their embedded base of customers and adopting timely and orderly steps to effectuate the transition from UNEs to alternative services. CLECs that added new local switching arrangements, UNE-P arrangements, high capacity loops, or high capacity transport in unimpaired wire centers or in excess of the caps for their customers existing as of March 11, 2005, will be considered part of the embedded base. CLECs must transition these **[*60]** arrangements by the end of the transition period unless a CLEC and BellSouth negotiate different language. The Commission rejects CompSouth's proposed language that would allow CLECs to add other delisted UNEs during the transition period. n107

n107 *See* Tipton Rebuttal at p. 16.

As explained above in connection with switching, the transition rate is the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus the FCC's prescribed transitional additive for that particular element. n108 For UNE switching, the additive is $ 1.00. n109 For UNE high capacity loops and transport, the additive is 15% of the rate paid (*i.e.,* a rate equal to 115% of the rate paid as of June 15, 2004). n110 Transition period pricing applies for each delisted UNE retroactively to March 11, 2005. n111 Facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the interconnection agreements. n112 The transition rates will not go into effect without **[*61]** a contract amendment but once the agreement is amended, the transition rate must be trued-up to the March 11, 2005, transition period start date. n113 The transition rates apply only while the CLEC is leasing the delisted element from BellSouth during the transition period. n114 Once the delisted UNE is converted to an alternative service, the CLEC will be billed the applicable rates for that alternative service going forward; and for those conversions that took place after March 10, 2006, the rates for the alternative service apply as of March 11, 2006. n115

n108 *Id* at p. 6.

n109 *Id.*

n110 *Id.*

n111 *Id.* at p. 11.

n112 *TRRO* n. 408, 524, 630.

n113 *Id.*

n114 *See* Tipton Rebuttal at p. 11.

n115 *Id.*.

CompSouth suggests that its members are entitled to transitional rates through March 10, 2006, even if they convert to alternative arrangements before that date. The Commission disagrees. n116 This decision is consistent with a decision of the Illinois Commerce Commission, **[*62]** which found:

> The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement says it does. Once the transition has been completed, the agreement takes over with all of its rates, terms, and conditions. The transition rates default only to those UNEs that have not transitioned to an alternate service arrangement.
>
> The Commission does not see how the imposition of agreement rates prior to the expiration of the deadline would somehow adversely affect an otherwise orderly transition. CLECs' argument, that SBC would have the incentive to overstate and exaggerate implementation challenges so as to convert as many UNEs as early as possible, defies logie. n117

n116 CompSouth's members and BellSouth are free to agree to such an arrangement, but CompSouth's members cannot compel BellSouth to enter such an arrangement.

n117 Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision,* November 2, 2005, p. 78.

[*63]

The Florida Commission determined that the TRRO transition rates will be based on the higher of the rates the Commission ordered for that element or combination of elements, and that transitional pricing ends March 10, 2006, and September 20, 2006, respectively for the affected delisted arrangements, whether or not the former UNEs have been converted. n118 The Georgia Commission determined that CLECs had until March 11, 2006, to order conversions from BellSouth, and that BellSouth is entitled to true-up any rate differences. n119

n118 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

n119 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission concluded that the transition should require the identification and physical reconfiguration of affected UNEs as soon as practicable, and it imposed transition rates throughout the transition period. n120 The South Carolina Commission likewise held that CLECs should identify their **[*64]** embedded base via spreadsheet and submit orders to BellSouth as soon as possible. The South Carolina Commission also ordered that unless a CLEC and BellSouth have negotiated other language, BellSouth's language on this issue should be included in interconnection agreements. n121 The Tennessee Regulatory Authority affirmed that the transition plan should be in accordance with *47 C.F.R. sections 51.319(a)*, (d), (e) and that CLECs should submit a spreadsheet to BellSouth by March 10, 2006. n122

n120 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n121 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n122 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

B. Issue 3: Modification and Implementation of Interconnection Agreement Language: *(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the* **[*65]** *FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration, any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?*

In its *TRRO,* the FCC directed that carriers "implement changes to their interconnection agreements consistent with [the FCC's] conclusions [in the TRRO]." n123 Accordingly, carriers must execute amendments to their interconnection agreements to remove the availability of all delisted UNEs. Over 96 CLECs in Mississippi have amended or entered into new interconnection agreements to implement the changes in law that are the subject of this proceeding. n124 The Florida Commission concluded that all Florida CLECs who have interconnection agreements with BellSouth are bound by the decisions in its change of law proceeding effective upon the issuance of the final order, and that modification and implementation of interconnection agreement language should be based on the TRRO obligations. n125 The Georgia Commission determined that parties are obligated to negotiate the necessary changes and are bound **[*66]** by the decisions in its generic docket. n126

n123 *TRRO* at P 233.

n124 *See* Blake Rebuttal at pp. 4-5.

n125 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

n126 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Utilities Commission ordered that BellSouth and CLECs must execute amendments based on the TRRO obligations unless the parties have mutually agreed on other language, and that its decisions in its generic docket will control all pending arbitration proceedings involving BellSouth. n127

n127 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission hereby orders all CLECs that have not yet executed a *TRO*- and *TRRO*- compliant amendment to their interconnection agreement to execute an amendment with Commission-approved **[*67]** contract language promptly following issuance of the Commission's Order approving such language.

Further, the Commission finds that its decisions in this generic docket will apply to interconnection agreements that currently are the subject of arbitrations proceedings before the Commission. n128 Proceeding in this manner is most efficient in that the Commission will have to address a given issue only once (which is one reason the Commission opened this generic docket rather than addressing these issues on a case-by-case basis). The same rationale applies to agreements that are being negotiated, but for which no arbitration has yet been filed.

n128 In Docket No. 2005-AD-138, certain CLECs filed a Joint Petition for Emergency Relief, arguing, among other things, that as a result of their "abeyance agreement" with BellSouth, they should not be required to amend their current interconnection agreements with BellSouth to incorporate the *TRRO* or the Commission's decisions in this generic proceeding. In addressing this issue the federal court in Mississippi did not reach the issue of the "abeyance agreement." *See Mississippi Order,* at n.11. In the March 9, 2005, *Order Establishing Pro-*

cedure, however, the Commission ruled that the most efficient means to address change of law issues raised by the FCC's orders was to proceed with this docket. In addition, in Docket No. 2004-AD-094, the Commission's duly appointed Arbitration Panel moved certain *TRO* related - arbitration issues to this proceeding. *See* June 14, 2005, *Order Granting BellSouth Telecommunications, Inc.'s Motion to Move TRO Arbitration Issues to Generic Proceeding.* The Commission hereby makes clear that all CLECs, including NuVox and Xspedius, must execute contract amendments or new agreements within the timeframes set forth in this order. The "abeyance agreement" does not allow NuVox and Xspedius to delay executing contract language until this Commission enters a final order in Docket No. 2004-AD-094.

[*68]

Finally, the Commission is aware that some CLECs have not negotiated with BellSouth in any form or fashion. CLECs cannot circumvent binding federal law through inaction. The Commission orders all CLECs to execute contract amendments or execute new agreements within 45 days of this order, unless BellSouth and the CLEC mutually agree to a different timeframe. If amendments are not executed within this timeframe or the agreed-upon timeframe, the language approved in this order will go into effect regardless of whether an amendment or new contract is executed.

C. Issue 4: High Capacity Loops and Dedicated Transport: *What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined: (i) business line; (ii) fiber-based collocation; (iii) building; (iv) route?*

The Commission finds that the federal rules and any definitions in them should be incorporated into interconnection agreements. To the extent that terms (such as "building") are not defined in those rules, the Commission finds that any disputes regarding the definition of such terms should **[*69]** be addressed on a case-by-case basis and in the context of the actual facts involved in any such dispute. The Commission believes that this approach will lead to better results than any attempt to define such terms in a vacuum.

The Commission rejects CompSouth's proposed fiber-based collocator language because it is not consistent with the applicable FCC rule. That rule, in its entirety, states as follows:

> Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as **[*70]** a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by *47 U.S.C. § 153*(1) and any relevant interpretation in this Title. n129

CompSouth's proposed language improperly adds the following language to the federal definition:

> For purposes of this definition: (i) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is BellSouth, then the other party's collocation arrangement shall ***not*** be counted as a Fiber-Based Collocator, (ii) a Comparable transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable with a minimum point-to-point symmetrical data capacity exceeding 12 DS3s; (iii) the network of a Fiber-Based Collocator may only be counted once in making a determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators **[*71]** in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as

a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis. n130

n129 *47 C.F.R. § 51.5.*

n130 First Revised Exhibit JPG-1 at p. 17.

The Commission also rejects CompSouth's proposed contract language about counting the network of fiber-based collocators separately. It makes sense that a CLEC purchasing fiber from another CLEC can qualify under the federal definition. If one CLEC purchases fiber from another, has terminating fiber equipment, and can use the fiber it purchases to transport traffic in and out of a wire center, it qualifies. CompSouth's proposed definition ignores this reality, and has the potential to lead to "gaming" the process. For example, a CLEC or other party could agree to purchase all of the collocation arrangements in a given wire center **[*72]** for some nominal sum, then lease this space back to the previous owners for a paltry amount in exchange for a percentage of the savings the former owners will accrue by paying cost-based UNE rates instead of special access rates. The Commission does not believe this is what the FCC intended when it adopted its rule.

The Florida Commission determined that a business line should include all business UNE-P and UNE-L lines; that fiber-based collocation should be based on the number of fiber-based collocators present when the count is made; that the definition of a building should be based on "a reasonable telecom person" approach such that a multi-tenant building with multiple telecom entry points is considered multiple buildings; and that the FCC's definition of a route is appropriate. n131

n131 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The Georgia Commission adopted BellSouth's definitions of business line count and route. It further held that it would not be appropriate **[*73]** to include planned mergers in counting fiber-based collocators and it adopted the "reasonable telecom person" standard for the term "building". n132

n132 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission simply concluded that the definitions contained in FCC Rule 51.5 are appropriate, and clarified the definitions of "building" and "route" consistent with the orders cited directly above. n133 The South Carolina Commission concluded that the federal rules and any definitions in them should be incorporated into interconnection agreements, and that it would address any disputes on a case-by-case basis. n134 The Tennessee Regulatory Authority concluded that definitions should be pursuant to FCC Rules 51.5 and 51.319(e), and that what constitutes a building will be determined on a case-by-case basis. n135

n133 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[*74]

n134 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n135 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.8,

2.1.4, 2.3, 2.8.4, 6.2-6.7, and 6.9, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

D. Issue 5: Unimpaired Wire Centers: *(a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate? (b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport? (c) What language should be included in agreements to reflect the procedures identified in (b)?*

Relevant Contract [*75] Provisions: PAT-1 Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8; PAT-2 Sections 2.1.4.2.1, 2.1.4.2.2, 2.1.4.4, 2.1.4.5, 5.2.2.1, 5.2.2.2, 5.2.2.4, 5.2.2.5

1. State Commission Authority

Pursuant to *USTA II,* the FCC may not delegate impairment decisions to State commissions. n136 State commissions, however, are charged with resolving disputes arising under interconnection agreements and with implementing the changes to interconnection agreements necessitated by the *TRRO.* n137 As a practical matter, therefore, the Commission must resolve the parties' disputes concerning the wire centers that meet the FCC's impairment tests so that all parties have a common understanding of the wire centers from which CLECs must transition former UNEs to alternative arrangements.n138

n136 *USTA II* at 574.

n137 *TRRO* at P 234.

n138 *See* Tipton Direct at pp. 29-30.

2. Mississippi Wire Centers that Currently Satisfy the FCC's Impairment Tests

For the reasons [*76] set forth below, the Commission finds that the following BellSouth wire centers in Mississippi satisfy the FCC's impairment tests: n139

		Transport	
Wire Center	Total Business Lines	Tier 1	Tier 2
JCSNMSCP	40109	X	
HTBGMSMA	12829		X

The Commission, therefore, orders CLECs to transition existing Section 251 transport in the wire centers listed above to alternative serving arrangements. The Commission further finds that CLECs have no basis to "self-certify" to obtain Section 251 transport in the future in the wire centers listed above.

n139 *See* PAT-4.

The dispute between BellSouth and the CLECs over these wire centers concerns the application of the FCC's rule defining business lines. n140 There are two aspects to this dispute. The first is BellSouth's inclusion of certain UNE loops, and the second is BellSouth's treatment of high capacity loops. The Commission finds that BellSouth properly implemented the applicable federal law with regard to both of these aspects of the dispute.

n140 *See 47 C.F.R. § 51.5.*

[*77]

With respect to the inclusion of certain UNE loops, the *TRRO* clearly requires BellSouth to include business UNE-P. n141 BellSouth did so, n142 it did not include residential UNE-P, n143 and the CLECs have not suggested that BellSouth should have included residential UNE-P. Moreover, the text of the FCC's definition of "business line" calls for the inclusion of "***all*** UNE loops," n144 and BellSouth included all UNE loops in its count (i.e. those loops offered as stand-alone loops or in combination with dedicated interoffice transport). The CLECs apparently take issue with this, arguing that in doing so, BellSouth has wrongly included some UNE loops that serve residential customers in its count of business loops.

n141 *TRRO* at P 105.

n142 *See* Tipton Direct at p. 33.

n143 *See* Tipton Rebuttal at p. 26.

n144 *47 C.F.R. § 51.5* (emphasis added).

The Commission finds that BellSouth's count is appropriate. The federal rule requires that the:

> number of business **[*78]** lines in a wire center [t]o equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. n145

The FCC intentionally required all UNE loops (excepting residential UNE-P) to be included, because doing so gauges "the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs." n146 Moreover, while the CLECs argue that some residential UNE loops may have been mistakenly included in BellSouth's count, their witness Mr. Gillan conceded that he did not think it was worth "correcting" BellSouth's business line count to exclude residential DSO loops because "it's such a small number ... trying to go in to do it correctly wouldn't be worth it." n147 CompSouth witness, Mr. Gillan, also acknowledged that BellSouth has no way of determining whether a given DSO loop is being used to provide business service or residential service. n148 Finally, if the Commission were to disregard completely some portion, estimate, or percentage of UNE loops, it would ignore the "opportunity" **[*79]** present in a particular wire center.

n145 *47 C.F.R. § 51.5*

n146 *TRO* at P 105.

n147 Hearing Exhibit No. 15 (Gillan Deposition) at p. 43.

n148 *Id.*

The CLECs also suggest that the Commission should undertake some calculation or estimate to capture "switched" UNE loops. CLEC witness Mr. Gillan, however, concedes there is no source that would provide data concerning which UNE loops are switched as compared to loops that are not switched. n149 Moreover, the FCC clearly intended to cap-

ture, with its business line test, an accurate measurement of the revenue opportunity in a wire center. n150 This intent is consistent with the revised impairment standard the FCC adopted in the *TRRO,* which considers, in part, whether requesting carriers can compete without access to particular network elements n151 and requires consideration of all the revenue opportunity that a competitor can reasonably expect to gain over facilities it uses, from all possible sources. n152 Finally, **[*80]** the FCC was very clear that it wished to avoid a "complex" test, or a test that would be subject to "significant latitude." n153 The Commission, therefore, declines to undertake the calculation or estimate suggested by the CLECs. This is consistent with decisions reached by the Illinois and Michigan Commissions. n154

n149 Hearing Exhibit No. 15 (Gillan Deposition) at p. 44.

n150 *TRRO* at P 104.

n151 *TRRO* at P 22.

n152 *Id.* at 1124.

n153 *TRRO,* P 99

n154 Illinois Commerce Commission Docket No. 05-0442, Arbitration Decision, November 2, 2005, p. 30; In re: *Commission's own Motion to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon, 2005 Mich. PSC LEXIS 310,* Order at * 13.

Additionally, the federal rule requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to **[*81]** be counted as one line. n155 The FCC's rule plainly states that "a DS1 line corresponds to twenty four 64 kbps-equivalents, and therefore to 24 'business lines'." n156 The FCC has made clear its "test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one." n157 The Commission finds that it is appropriate to consider the potential customers CLECs can serve.

n155 *47 C.F.R. § 51.5.*

n156 *Id.*

n157 *See* Sept. 9, 2005, Brief for the FCC Respondents, United States Court of Appeals, D.C. Cir. No. 05-1095.

3. Identifying Wire Centers in the Future that Satisfy the FCC's Impairment Tests

CompSouth has proposed a means for identifying future wire centers that would resolve disputes relating to BellSouth's subsequent wire center identification within ninety days after BellSouth's initial filing. n158 BellSouth has objected to any process that limits its right to designate future wire centers **[*82]** on an annual basis, and the Commission finds nothing in the federal rules that supports any such limitation. Moreover, CompSouth's proposed process inserts a number of qualifications to the data that it seeks from BellSouth, and the Commission can find no basis in the applicable law for such qualifications. The Commission, therefore will not adopt the CLECs' proposed contract language.

n158 *See* Gillan Direct at pp. 32-33.

Under BellSouth's proposal, if wire centers are later found to meet the FCC's no impairment criteria, BellSouth will notify CLECs of these new wire centers via a "Carrier Notification Letter." The non-impairment designation will become effective 10 business days after posting the Carrier Notification Letter. Beginning on the effective date, BellSouth would no longer be obligated to offer high capacity loops and dedicated transport as UNEs in such wire centers, except pursuant to the selfcertification process. This means that if a CLEC self certifies, BellSouth will process the order, subject to **[*83]** its right to invoke the dispute resolution process if BellSouth believes the self-certification is invalid. High capacity loop and transport UNEs that were in service when the subsequent wire center determination was made will remain available as UNEs for 90days after the effective date of the non-impairment designation. This 90 day period is referred to as the "subsequent transition period." No later than 40 days from the effective date of the non-impairment designation, affected CLECs must submit spreadsheets identifying their embedded base UNEs to be converted to alternative BellSouth services or to be disconnected. From that date, BellSouth will negotiate a project conversion timeline that will ensure completion of the transition activities by the end of the 90 day subsequent transition period.

The *Commission* finds that BellSouth's proposal is reasonable and in compliance with applicable law. Moreover, BellSouth's proposal has been agreed to by a number of CLECs. n159 The Florida Commission ruled that it has the authority to resolve an ILEC' s challenge to a CLEC self-certification under an interconnection agreement dispute resolution provision; that it would approve the initial **[*84]** wire center lists; that CLEC's should exercise due diligence in making inquiries about the availability of UNEs and must self-certify; and that BellSouth should provision requested UNEs but may bring disputes to the Commission for resolution. n160

n159 *See* Blake Rebuttal at p. 4.

n160 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The North Carolina Commission concluded that it has the authority to ascertain whether BellSouth has appropriately categorized its wire centers using the FCC's rules. It further directed BellSouth to use the same utilization factor for CLEC hi-cap UNE-L as exists for BellSouth's hi-cap lines, and it ruled that BellSouth may count the number of lines provided via HDSL, ADSL, UCL-Short and IDSL loops on a one-for-one basis. n161

n161 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[*85]

The South Carolina Commission found that BellSouth had properly identified the wire centers where no impairment exists. It also concluded that BellSouth's business line count, its treatment of hi-cap loops, and its inclusion of certain UNE loops was properly implemented. n162

n162 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Tennessee Regulatory Authority determined that it has the authority to resolve disputes concerning wire center impairment tests. It held that BellSouth's counting methodology was correct, with the exception that BellSouth cannot report full system capacity. n163

n163 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed **[*86]** language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.4.5.1, 2.1.4.5.2, 2.1.4.9, 2.1.4.10, 6.2.6.1, 6.2.6.2, 6.2.6.7, 6.2.6.8, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

E. Issue 9: Conditions Applicable to the Embedded Base *What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC 's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?*

The Commission finds that BellSouth should not be required to accept or process orders adding new delisted UNEs. The *TRRO* expressly bars *all* new UNE-P arrangements, not just those used to serve new customers. When a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching and a new UNE-P, which is prohibited by the plain language of the FCC's order and Rules. n164

n164 *TRRO* P227

[*87]

Significantly, the recent decision by the federal district court in Mississippi addresses this matter. In its April 13, 2005, Order, the United States District Court for the Southern District of Mississippi stated:

> [A] comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching order would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and 'does not permit competitive LECs to add new customers using unbundled access to local circuit switching. n165

n165 *Mississippi Order, 368 F. Supp. 2d, 557, 560-561.* (citations omitted from original) (emphasis added).

Additionally, a federal district court in Georgia confirmed that BellSouth's position is **[*88]** correct. On April 5, 2005, the United States District Court for the Northern District of Georgia ruled that:

> [u]nder the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 months and at higher rates than they were paying previously. The FCC made plain that these transition plans applied only to the embedded base and that competitors were 'not permit[ed]' to place new orders. n166

n166 *BellSouth Telecoms. Inc. v. MCI Metro Access Transmission Servs. LLC, 2005 U.S. Dist. LEXIS 9394* (N.D. Ga. Apr. 5, 2005) ("*Georgia Order*") at * 6-7, *aff'd BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964 (11th Cir. 2005)* ("*11th Circuit Order*").

This rationale applies equally to the situation when a CLEC seeks to move a customer's service to a different location, because doing so requires disconnection of the service and the placement of a "new" **[*89]** order for delisted service.

Changes to existing service do not require a new service order. BellSouth, accordingly, agrees that it is required under the *TRRO* to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period. n167

n167 *See* Blake Direct at p. 9.

In order to submit an order for a high-capacity loop or transport UNE, a CLEC must self-certify, based on a reasonably diligent inquiry, that it is entitled to unbundled access to the requested element. n168 BellSouth must process the request. n169 It may only subsequently challenge the validity of such order(s) pursuant to the dispute resolution provision in the parties' interconnection agreement. n170

n168 *TRRO* at P 234.

n169 *Id.*

n170 *Id.*

In accordance with the *TRRO,* BellSouth has been accepting and processing **[*90]** CLEC orders for new high-capacity loops and dedicated transport even in those wire centers and for those routes that BellSouth has identified as areas where CLECs are not impaired pursuant to the competitive thresholds the FCC set forth in the TRRO. n171 The Commission has confirmed the Mississippi wire centers that satisfy the FCC's impairment tests. CLECs have no basis whatsoever to "self-certify" orders for high capacity loops and dedicated transport in the confirmed wire centers. The Florida Commission held that CLECs may not move existing or add new switching, hi-cap loops or dedicated transport, but that changes to existing service are allowed during the transition period. n172 The North Carolina Commission determined that no conditions should be imposed on moving, adding, or changing orders to a CLEC's embedded base and that BellSouth should not impose disconnection or non-recurring charges when transitioning the delisted Section 251 UNEs to alternate services. n173 The South Carolina Commission referred back to its "No New Adds Order," in which it ruled that BellSouth must accept orders for moves, changes or adds to a CLEC's embedded base and allowed changes at existing locations. **[*91]** n174 The Tennessee Regulatory Authority concluded that CLECs are not allowed new adds in provisioning service to their embedded base customers including moves, adds and changes. BellSouth may reject any and all new orders for delisted UNEs. n175 The Georgia Commission adopted BellSouth's proposed language. n176 The Commission finds that CLECs must abide by the Commission's wire center confirmation to eliminate future disputes.

n171 *Id.*

n172 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

n173 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n174 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n175 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

n176 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's **[*92]** proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.4.3.2, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

F. Issue 10: Transition of Delisted Network Elements To Which No Specified Transition Period Applies: *What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and (a) what is the proper treatment for such network elements at the end of the transition period; and (b) what is the appropriate transi-*

tion period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

The Commission has addressed the rates, terms and conditions for elements delisted by the *TRRO* and which have a designated transition period, including those identified **[*93]** in subpart (b) above, in connection with its discussion of Issue 2. In addition to taking steps to transition away from elements delisted by the *TRRO,* the FCC removed significant unbundling obligations in the *TRO,* including, entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber to the curb, fiber sub-loop feeder, line sharing and packet switching.

The FCC eliminated the ILECs' obligation to provide unbundled access to these elements 2 years ago in the *TRO.* CLECs that still have the rates, terms and conditions for these elements in interconnection agreements have reaped the benefits of unlawful unbundling of these elements for far too long. As such, with the exception of entrance facilities, which BellSouth will agree to allow CLECs to transition with their embedded base and excess dedicated transport, BellSouth is authorized to disconnect or convert such arrangements upon 30 days written notice, absent a CLEC order to disconnect or convert such arrangements earlier. n177 BellSouth should also be permitted to impose applicable non-recurring charges. n178 To do otherwise would provide an incentive for these CLECs to further **[*94]** delay implementation of the *TRO.* The Commission finds that BellSouth's proposed contract language is fully consistent with the *TRO.*

n177 *See* Tipton Direct at pp. 43-44.

n178 *See* Tipton Direct at p. 44.

The Florida Commission concluded that after the effective date of the change-of-law amendment, BellSouth is authorized to disconnect or convert delisted elements after a 30-day written notice period. It also ruled that BellSouth should identify and post on its website as a Carrier Notification Letter subsequent determinations that a wire center meets the non-impairment criteria and that BellSouth will no longer have to provide UNEs in such wire center 30-days following the posting of the Carrier Notification Letter. The Florida Commission also found that if a CLEC disputes the non-impairment claim within 30 days, then BellSouth must provision the UNE and review the claim, then upon resolution of the dispute, the rates will be trued-up. n179

n179 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[*95]

The Georgia Commission adopted a transition period of 30-days for CLECs to submit conversion orders. It also adopted a 120-day transition period for subsequently identified non-impaired wire centers. Finally, the Georgia Commission adopted CompSouth's position and required BellSouth to provide actual written notice of subsequent non-impairment determinations. n180

n180 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission determined that any service arrangements delisted as UNEs by the FCC should be removed from interconnection agreements as Section 251 UNE offerings effective with the TRRO amendment. It furthered ordered that BellSouth shall not impose disconnection or nonrecurring charges when transitioning delisted Section 251 UNEs. n181

n181 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[*96]

The South Carolina Commission ordered that, with the exception of entrance facilities, BellSouth is authorized to disconnect or convert UNEs upon 30-days written notice, and that it may impose applicable non-recurring charges. n182

n182 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 1.7 and 4.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

G. Issue 11: UNEs That Are Not Converted: *What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms, and conditions that apply in such circumstances?*

The *TRRO* requires **[*97]** CLECs to transition their entire embedded base of switching and high capacity loops and transport by March 10, 2006. To accomplish this, and to minimize disruption to end users, BellSouth obviously needs CLECs to timely provide it with information concerning their plans for these services. The Commission has reviewed BellSouth's proposals and finds them to be reasonable. n183

n183 *See* Tipton Direct at pp. 45-50.

BellSouth asked that CLECs should identify their embedded base UNE-Ps as soon as possible and to submit orders to disconnect or convert the embedded base in a timely manner so as to complete the transition process by March 10, 2006. n184 BellSouth also asked that if CLECs failed to submit orders in a timely manner, BellSouth should be permitted to identify all such remaining embedded base UNE-P lines and convert them to the equivalent resold services no later than March 10, 2006, subject to applicable disconnect charges and the full nonrecurring charges in BellSouth's tariffs). n185 Absent a commercial **[*98]** agreement for switching, BellSouth is authorized to disconnect any remaining stand-alone switching ports within fourteen (14) days after the effective date of this Order. n186 To do otherwise will intent CLECs to simply continue to refuse to act in order to delay implementation of the *TRRO.*

n184 *See* Tipton Direct at p. 46.

n185 *Id.*

n186 *Id.*

For high capacity loops and dedicated transport, BellSouth requested that CLECs submit spreadsheets by December 9, 2005, to identify and designate transition plans for their embedded base of these delisted UNEs. n187 The Commission will require CLECs to do so as soon as possible, but in no event more than 15 days after the date of this Order. n188 If CLECs fail to comply with this requirement, BellSouth is authorized to identify such elements and transition such circuits to corresponding BellSouth tariffed services within fourteen (14) days after the effective date of this Order, retroactive to March 11, 2006, and also subject to applicable disconnect charges **[*99]** and full nonrecurring charges in BellSouth's tariffs. n189

n187 *See* Tipton Direct at pp. 46-47.

n188 This 15-day requirement applies unless a CLEC and BellSouth agree to a different time frame.

n189 *See* Tipton Direct at p. 47.

For dark fiber, BellSouth requested that CLECs submit spreadsheets to identify and designate plans for their embedded base dark fiber loops and delisted dark fiber transport to transition to other BellSouth services by June 10, 2006. n190 If a CLEC has failed to submit such spreadsheets, BellSouth is authorized to identify all such remaining embedded dark fiber loops and/or delisted dark fiber dedicated transport and transition such circuits to the corresponding BellSouth tariffed services no later than 15 days after the date of this Order, subject to applicable disconnect charges and full nonrecurring charges set forth in BellSouth's tariffs. n191

n190 *See* Tipton Direct at pp. 47-48.

n191 *Id.*

[*100]

BellSouth's proposed contract language is fully consistent with the TRO. The Florida Commission decided this issue within the context of Issue 2 above. n192 The Tennessee Regulatory Authority did the same. It further ruled that CLECs had 30-days from deliberation to submit their conversion spreadsheets and that if they failed to do so, BellSouth could bring the issue before the Tennessee Regulatory Authority for resolution. Finally, the Tennessee Regulatory Authority ruled that BellSouth could not unilaterally convert CLEC circuits prior to March 10, 2006, nor could it unilaterally disconnect any circuits at any time n193

n192 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

n193 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

The Georgia Commission determined that CLECs had until March 10, 2006, to submit orders for the transition. It also ordered BellSouth to true-up the difference for conversions completed prior **[*101]** to March 10, 2006. The Georgia Commission ruled that BellSouth could charge CLECs the' resale tariffed rate for local switching beginning March 11, 2006. It also concluded that BellSouth should not take any action with regard to wire centers in dispute until the Georgia Commission had resolved the dispute. n194

n194 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission found that where BellSouth has tariffed alternatives to a delisted UNE and if a CLEC does not submit a conversion order, BellSouth can convert those UNEs to the appropriate tariffed rate effective on the day following the end of the transition period. No disconnection or nonrecurring charges should apply. For stand alone ports and other services for which no tariffed offering exists, the Commission concluded that BellSouth must provide each CLEC with a list of ports and other services for which no order has been placed, together with a notice that the service will be disconnected on the day after the end **[*102]** of the transition period. n195

n195 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The South Carolina Commission ruled that CLECs must identify their embedded base UNE-Ps and submit orders to disconnect or convert them. If CLECs fail to submit orders, BellSouth may identify and convert them to the equivalent resold service no later than March 10, 2006, subject to applicable disconnect charges and full nonrecurring charges. Absent a commercial agreement, BellSouth is authorized to disconnect any stand alone switching ports which remain in place on March 11, 2006. n196

n196 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth **[*103]** in Appendix A to this Order, including without limitation Sections 4.2.5, 4.2.6, 5.4.3.5, 5.4.3.6, 2.1.4.11, 2.8.4.7, 6.2.6.9, 6.9.1.9, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi, which interconnection agreements shall be deemed effective as of March 11, 2006.

H. Issue 32: Binding Nature Of Commission Order: *How should the determinations made in this proceeding be incorporated into existing § 252 interconnection agreements?*

The Georgia Commission clarified that its order in the generic change of law proceedings applies to certificated CLECs. If, however, parties have entered into a separate agreement, they are bound by those agreements. n197 The North Carolina Commission ordered that BellSouth and CLECs with whom it has interconnection agreements currently in effect should execute and file amendments to the interconnection agreements that are consistent with the provisions of their Order, or are mutually agreeable to the parties to the interconnection agreements, by March 10, 2006. n198

n197 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

[*104]

n198 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The South Carolina Commission ruled that unless the parties agreed otherwise, BellSouth and all CLECs operating in South Carolina should promptly execute contractual amendments to incorporate language that the Commission adopts so that the FCC's deadlines can be met. The South Carolina Commission also ruled that if a TRO and TRRO related amendment is not signed, then the Commission's approved language goes into effect. n199

n199 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Tennessee Regulatory Authority determined that companies that fail to execute new interconnection agreements shall be deemed to have done so. n200

n200 Tennessee Regulatory Authority Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[*105]

The Commission intends that unless they agree otherwise, BellSouth and all CLECs operating in Mississippi promptly execute contractual amendments to incorporate the language the Commission adopts in this proceeding so that the FCC's transitional deadlines are met. These amendments must be executed no more than 45 days after the date of this Order. If an amendment is not executed within the allotted timeframe, the Commission's approved language will go into effect for all CLECs in the state of Mississippi, regardless of whether an amendment is signed. n201

n201 The Commission notes also that it has previously addressed the "Abeyance Agreement" between BellSouth and CompSouth members Nuvox and Xspedius in its discussion of Issue 3.

III. Service-Specific Issues (13, 15, 16, 29, 31)6F5F296777931F207A936413408A9D907740D4802B4656ADBC700EAE109814D4C9C35C07A6A82963F0D3913C24FAFEC4EEFE6FBAD3345

A. Issue 13: Performance Plan: *Should network elements delisted under Section 251(c)(3) be removed from the SQM/PMAP/SEEM?* **[*106]**

In deciding this issue, the Commission first notes that the Georgia Commission recently entered an *Order Adopting Hearing Officer's Recommended Order,* dated June 23, 2005, in Docket No. 7892-U, in which it approved a Stipulation Agreement reached between BellSouth and several CLEC parties. This stipulation provides, in part:

> 1. All DSO wholesale platform circuits provided by BellSouth to a CLEC pursuant to a commercial agreement are to be removed from the SQM Reports; Tier 1 payments; and Tier 2 payments starting with May 2005 data.
>
> 2. The removal of DSO wholesale platform circuits as specified above will occur region-wide.
>
> 3. All parties to this docket [the Performance Measurements docket] reserve the right to make any arguments regarding the removal of any items other than the DSO wholesale platform circuits from SQM/SEEMs in Docket No. 19341-U [the Generic Chane of Law docket] to the extent specified in the approved issues list. n202

This regional Stipulation was endorsed by a number of CLECs, including AT&T, Covad, MCI and DeltaCom, all of whom are members of CompSouth.

n202 Blake Direct at p. 13.

[*107]

Although this Stipulation is not binding on all parties to this docket, it supports the Commission's finding that elements that are no longer required to be unbundled pursuant to Section 251(0(3) should not be subject to a SQM/PMAP/SEEM plan. The SQM/PMAP/SEEM plan was established to ensure that BellSouth would continue to provide nondiscriminatory access to elements required to be unbundled under Section 251(0(3) after BellSouth gained permission to provide in-region interLATA service. If BellSouth fails to meet measurements set forth in the plan, it must pay a monetary penalty to a CLEC and/or to the State. Section 251(c)(3) elements are those elements which the FCC has determined are necessary for CLECs to provide service and without access to the ILEC's network, the CLEC would be impaired in its ability to do so.

In determining that certain elements are no longer "necessary" and that CLECs are not "impaired" without access to them, the FCC found that CLECs were able to purchase similar services from other providers. These other providers are not required to perform under a SQM/PMAP/SEEM plan. To continue to impose upon BellSouth a performance measurement, and possible penalty, **[*108]** on competitive, commercial offerings is discriminatory and anticompetitive. For commercial offerings, the marketplace, not a SQM/PMAP/SEEM plan, becomes BellSouth's penalty plan. If BellSouth fails to meet a CLEC's provisioning needs, such CLEC can avail itself of other providers of the service and BellSouth is penalized because it losses a customer and associated revenues. n203

n203 Blake Direct at p. 11.

The Florida and South Carolina Commissions both ruled that performance data for services no longer provided under Section 251(c)(3) should be removed from BellSouth's SQM/PMAP/SEEM plans. n204 The Georgia Commission concluded that performance plans were intended to enforce BellSouth's Section 271 obligations beyond those tied to Section 251. n205 The North Carolina Commission determined that the issue was moot as a result of that Commission's approval of the new SQM/SEEM plan in its Docket No. P-100, Sub 133k effective November 15, 2005. n206

n204 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06- 0172, March 2, 2006); and South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[*109]

n205 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

n206 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission, therefore, finds that network elements that are delisted under Section 251(c)(3) should be removed from the SQM/PMAP/SEEM plans.

B. Issue 15: Conversion of Special Access Circuits to UNEs: *Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?*

CompSouth witness, Mr. Gillan, did not file any direct or rebuttal testimony addressing Issue 15. n207 BellSouth, on the other hand, explained that it will convert special access services to UNE pricing, subject to the FCC's service eligibility requirements and limitations on high-cap EELs, once a CLEC's contract has these terms incorporated in its contract. n208 BellSouth also presented testimony that it will convert UNE circuits to special access services and that special access to UNE conversions should **[*110]** be considered termination of any applicable volume and term tariffed discount plan or grandfathered arrangements. n209 BellSouth presented evidence that the applicable rates for conversions in Mississippi for the first single DS I or lower capacity loop conversion on an LSR should be $ 25.01 and $ 3.53 per loop for additional loop conversions on that LSR and $ 26.50 for a project consisting of 15 or more loops submitted on a single spreadsheet, and $ 5.02 for each additional loop on the same LSR generated via a spreadsheet. For DS3 and higher capacity loops and for interoffice transport conversions, BellSouth presented evidence that the rate should be $ 40.22 n210 for the first single conversion on an LSR and $ 13.50 per loop for additional single conversions on that LSR. For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth proposed $ 63.98 for the first loop and $ 25.59 for each additional loop conversion on that same spreadsheet. Finally, BellSouth presented evidence that the Commission-ordered rate of $ 5.63 should apply for EEL conversions until new rates are issued n211 and that if physical changes to the circuit are required, **[*111]** the activity should not be considered a conversion and the full nonrecurring and installation charges should apply. n212 Based on the evidence presented by BellSouth and the lack of evidence presented by the CLECs, the Commission adopts BellSouth's proposed language.

n207 Hearing Exhibit No. 15 (Gillan Deposition) at p. 77.

n208 Tipton Direct at p. 57.

n209 *Id.*

n210 BellSouth recently updated the rates for DS3 and higher capacity loops and interoffice transport conversions that it will offer its wholesale customers in its standard interconnection agreement, which is posted at www.interconnection.bellsouth.com. The DS3 rates set forth in Ms. Tipton's testimony mirrored the rates that were in BellSouth's standard interconnection agreement at the time of this proceeding. BellSouth is not precluded from offering CLECs lower rates consistent with its modifications, which the Commission understands are as follows: $ 36.87 for the first single conversion on an LSR (changed from $ 40.22), $ 16.14 per loop for additional single conversions on that LSR (changed from $ 13.50). For a project consisting of 15 or more such elements in a state submitted on a single spreadsheet, BellSouth is offering $ 38.36 for the first loop (changed from $ 63.98) and $ 17.63 (changed from $ 25.59).

[*112]

n211 Tipton Direct at p. 58; *see also note above.*

n212 Tipton Direct at p. 57; *see also note above.*

The Florida Commission determined that BellSouth is obligated to provide conversions of special access to UNE pricing. n213 The Georgia Commission remanded this issue for evidence on the issue of the appropriate conversion rate. In the interim, it adopted a rate of TELRIC plus 15%. n214 The North Carolina Commission determined that BellSouth is required to provide conversion of special access circuits at its proposed "switch-as-is" rate. n215 The South Carolina Commission adopted BellSouth's proposed language. n216

n213 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06- 0172, March 2, 2006).

n214 Georgia Public Service Commission Docket No. 19341-U (February 7. 2006).

n215 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n216 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[*113]

The Commission notes that nothing precludes BellSouth from offering conversions at rates lower than those specified in this Order as set forth in note 165. The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.6 and 1.13, shall be included in interconnection agreements between BellSouth and CLECs operating in Mississippi.

C. Issue 16: Pending Conversion Requests: *What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?*

Relevant Contract Provisions: Neither BellSouth nor CompSouth propose specific language on this issue. The parties' dispute concerns CLECs' unfounded claims for retroactive conversion rights. See BellSouth Pre-filed Testimony of Pamela Tipton, Exhibit PAT-5.

CompSouth witness, Mr. Gillan, did not file any direct testimony addressing Issue 16. n217 In his rebuttal testimony, Mr. Gillan claimed that conversion language and rights must be retroactive to March 11, 2005, the **[*114]** effective date of the *TRRO.* n218 This Commission disagrees, because retroactive conversion rights were not contemplated in the *TRO.* Instead, the FCC made clear that "carriers [were] to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts." n219 This is the conclusion the Massachusetts and Rhode Island commissions reached when confronted with this issue. n220 The Florida Commission held that any conversions to stand-alone UNEs that were pending on the effective date of the TRO shall be effective with the date of the amendment or interconnection agreement that incorporates conversions. n221 The Georgia Commission concluded that CLECs that submitted legitimate requests for conversions to UNEs or UNE combinations prior to the effective date of the TRO are entitled to UNE pricing as of the date the TRO became effective. n222

n217 Hearing Exhibit No. 15 (Gillan Deposition) at p. 77.

n218 Gillan Rebuttal at pp. 40-41.

n219 *TRO* at P 588.

n220 *See Massachusetts Arbitration Order,* p. 135; *see also Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 30 ("Paragraph 589 [of the *TRO*] does not contain any clear FCC mandate that

pricing for conversions begin on the effective date of the *TRO,* which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect").

[*115]

n221 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06- 0172, March 2, 2006).

n222 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission determined that the rates, terms and conditions for conversions should be retroactive to the TRO effective date, and that pending orders should be processed under the conditions that existed prior to the TRO. n223 The South Carolina Commission determined that the language contained in the interconnection agreements at the time the TRO became effective governs the appropriate rates, terms and conditions and effective dates for conversion requests that were pending. It held that conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended. n224

n223 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n224 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[*116]

The Commission, therefore, finds that Mr. Gillan's testimony on this issue is incorrect and that it is inconsistent with the *TRO and the TRRO.* The contract language contained in a CLEC's interconnection agreement at the time the *TRO* became effective governs the appropriate rates, terms, conditions and effective dates for conversion requests that were pending on the effective date of the TRO. n225 Conversion rights, rates, terms and conditions are not retroactive and become effective once an interconnection agreement is amended. n226

n225 Tipton Direct at pp. 58-59.

n226 Tipton Direct at p. 59.

D. Issue 29: Enhanced Extended Link ("EEL") Audits: *What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?*

The essential dispute between the parties is that CompSouth claims that BellSouth must show cause to the CLEC before it can begin an audit. n227 The Commission, however, is concerned that this requirement could be used by some CLECs to delay or even **[*117]** evade an appropriate audit. Additionally, an audit often is necessary in order to determine whether there is or is not cause for concern.

n227 Hearing Exhibit No. 15 (Gillan Deposition) at p. 84.

Moreover, BellSouth witness Ms. Tipton generally explained that BellSouth has not conducted audits without cause, n228 and the fact that BellSouth's proposed language calls for BellSouth to pay for an audit that does not reveal issues is a deterrent to BellSouth's unreasonably requesting an audit. BellSouth's proposed language allows it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria, and requires BellSouth to obtain and pay for an independent auditor who will conduct the audit pursuant to American Institute for Certified Public Accountants ("AICPA") standards. n229 The auditor determines material compliance or non-compliance.

n230 If the auditor determines that CLECs are not in compliance, the CLECs are required to true-up any difference in payments, convert noncompliant **[*118]** circuits, and make correct payments on a going-forward basis. n231 Also, CLECs determined by the auditor to have failed to comply with the service eligibility requirements must reimburse the ILEC for the cost of the auditor. n232

n228 Tipton Rebuttal at pp. 37-39.

n229 Tipton Direct at pp. 64-65.

n230 *Id.*

n231 *Id.*

n232 *Id.*

The Florida Commission held that BellSouth need not identify the specific circuits that are to be audited; that the audit should be performed by an independent, third-party auditor selected by BellSouth; that the audit should be performed according to the standards of the AICPA; and that the CLEC may dispute any portion of the audit following the standard dispute resolution process in the interconnection agreement after the audit is complete. n233

n233 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06- 0172, March 2, 2006).

[*119]

The Georgia Commission adopted CompSouth's position and found that BellSouth must have some cause prior to initiating an audit. It held that BellSouth does not have to obtain the agreement of a CLEC with regard to the auditor. It further concluded that CLECs must reimburse BellSouth for the cost of the audit if material non-compliance is found. n234

n234 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission ruled that 30 to 45 days advance notice shall be given to a CLEC prior to an audit and that BellSouth must prepare a Notice of Audit stating its concern that the CLEC has not met the qualification criteria and its concise reasons therefore. BellSouth may select the auditor of its choice without prior approval of the CLEC or the Commission. Finally, the North Carolina Commission found that challenges may be filed with the Commission following the audit. n235

n235 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

[*120]

The South Carolina Commission ruled that, unless a CLEC and BellSouth have negotiated different language, BellSouth's language is accepted. BellSouth is authorized to conduct audits without having to prove cause; that if an auditor determines non-compliance, the CLEC is required to true-up any difference in payments, convert non-compliant circuits and make correct payments going forward; and that CLECs who have been determined by the auditor to fail the service eligibility requirements must reimburse the ILEC for the cost of the audit. n236

n236 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 5.3.4.3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

E. Issue 31: Core Forbearance Order: [*121] *What language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements?*

Neither BellSouth nor CompSouth has proposed specific contractual language regarding the *Core Order.* n237 Thus, the only language before the Commission is the language proposed by ITC¬DeltaCom, which suggests that BellSouth's template agreement should include language implementing the *Core Order.* The *Core Order,* however, provides CLECs with various choices that allow different CLECs to elect different rate structures. n238 Due to these choices, a one-size-fits-all approach is inappropriate. n239 As BellSouth witness Ms. Tipton explained, even if language addressing the *Core Order* were included in an agreement, the parties to each agreement still must identify their desired rate structure. Including standard language, therefore, would not address all scenarios encountered in the implementation of the *Core Order.* n240

n237 *See* First Revised Exhibit JPG-1, p. 63.

n238 Tipton Direct at p. 71.

n239 *Id.*

n240 Tipton Rebuttal at pp. 41-42.

[*122]

The Florida Commission determined that all affected CLECs are entitled to amend their agreements to implement the ISP Remand Core Forbearance Order and that such amendments shall be handled on a carrier-by-carrier basis, n241 The Georgia Commission ordered that interconnection agreements be amended to remove "new markets" and "growth caps" restrictions, and the North Carolina Commission ruled likewise. n242 The South Carolina Commission ruled that BellSouth should resolve this issue on a carrier-by-carrier basis. n243

n241 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06- 0172, March 2, 2006).

n242 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n243 Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

Accordingly, the Commission finds that BellSouth should resolve this issue on a carrier- by-carrier basis depending on the specific facts of each particular **[*123]** situation.

IV. Network Issues (6, 19, 23, 24, 26, 27, 28)

A. Issue 6: HDSL Capable Copper Loops: *Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?*

This issue presents two questions that require Commission resolution, and both of these questions relate specifically to BellSouth's UNE HDSL loop product, rather than to HDSL compatible loops generally. The first question is if, in the future, BellSouth satisfies the FCC's impairment thresholds for DS1 loops, would BellSouth be obligated to provide CLECs with its UNE HDSL loop product? Second, can BellSouth count each deployed UNE HDSL loop as 24 voice grade equivalent lines?

Concerning the first question, the Commission finds that CLECs are not entitled to order UNE HDSL loops in wire centers that satisfy the FCC's thresholds for DS1 loop relief. This conclusion is explicitly supported by the FCC's definition of a DS 1 loop. The FCC defined a DS1 loop as including "2-wire and 4-wire copper Loops capable of providing high-bit rate digital subscriber line services, such as 2-wire and 4-wire HDSL Compatible Loops." n244

n244 47 C.F.R. § 51, 319(a)(4); Fogle Rebuttal at p. 4.

[*124]

The CLEC witnesses ignore the FCC's definition of a DS1 loop and cite to FCC language addressing HDSL capable loops generally, rather than to the clear and unambiguous language contained in the rules. n245 The CLECs' position is misplaced because, by defining DS1 loops as including a 2-wire and 4-wire HDSL loops, the FCC expressly removed any obligation to provide these loops in unimpaired wire centers. n246

n245 Gillan Direct at p. 29.

n246 More importantly, however, the CLECs cannot refute the reality that there has been very little CLEC interest in BellSouth's UNE HDSL product at all, as only 178 UNE HDSL loops were in service to *all* CLECs in Mississippi as of August 2005.

In contrast, BellSouth's proposed language implements the applicable federal rules, which, by their terms, extend unbundling relief to UNE HDSL loops in the same wire centers in which BellSouth is not obligated to provide CLECs with DS1 loops. The Commission, therefore, adopts BellSouth's proposed language.

The second question posed by **[*125]** this issue relates to how UNE HDSL loops should be calculated in future determinations of wire centers that satisfy the FCC's impairment thresholds. The Commission finds that UNE HDSL loops can and should be counted as 24 business lines. In the *TRO* the FCC explained:

> We note throughout the record in this proceeding parties use the terms DS 1 and T1 interchangeably when describing a symmetric digital transmission link having a total 1.544 Mbps digital signal speed. Carriers frequently use a form of DSL service, i.e., High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as the means for delivering T1 services to customers. We will use DS1 for consistency but note that a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for a symmetric digital transmission link of 1.544 Mbps. n247

The FCC has also made clear that, for the purposes of calculating business lines, "a DS 1 line corresponds to 24 kbps-equivalents, and therefore to 24 'business lines'." n248 Since the FCC has declared that a DS1 loop and a T1 are equivalent in speed and capacity, and since the FCC declared that UNE HDSL loops are used to deliver T1 services, **[*126]** it is obvious that BellSouth's UNE HDSL loops must be counted, for the purpose of determining business lines in an office, on a 64 kbps equivalent basis, or as 24 business lines. n249 The Florida and North Carolina Commissions determined that HDSL loops are not the equivalent of DS1 loops for evaluating wire center impairment and should not be counted as voice grade equivalents. n250 The Georgia Commission ruled to the contrary, as did South Carolina and Tennessee, which is consistent with BellSouth's position. n251 BellSouth's proposed contract language is fully consistent with the FCC's decisions and, thus, is approved.

n247 *TRO,* n. 634 (emphasis supplied).

n248 *47 C.F.R. § 51.5.*

n249 Fogle Rebuttal at pp. 3-4.

n250 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006); and North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

n251 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006); and Tennessee Regulatory Agenda Vote Session Transcript Docket No. 04-00381 (March 6, 2006).

[*127]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 2.3.6.1, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

B. Issue 19: Line Splitting: *What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?*

No CLEC witness provided any testimony concerning line splitting, which occurs when one CLEC provides narrowband voice service over the low frequency portion of a loop and a second CLEC provides xDSL service over the high frequency portion of that same loop and provides its own splitter. n252 In contrast, BellSouth's witness on this issue, Mr. Fogle, demonstrated the need for BellSouth's contract language, which involves a CLEC purchasing a stand-alone loop (the whole loop), providing its own splitter in its central office leased collocation space, and then sharing the portion of the loop frequency not in use with a second CLEC. n253

n252 TRO at P 251; *Line Sharing Reconsideration Order* at 33; Hearing Exhibit No. 15 (Gillan Deposition) at pp. 77.78.

[*128]

n253 Fogle Direct at pp. 9-11.

CompSouth's language would require BellSouth to provide line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to Section 271. As set forth above, however, the Commission does not support the reincarnation of UNE-P and will not require any references to Section 271 in Section 251/252 interconnection agreements. Moreover, the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting. n254

n254 Fogle Rebuttal at p. 8.

CompSouth also proposes that BellSouth be obligated to provide splitters between the data and voice CLECs that are splitting a UNE-L. Mr. Fogle, however, made clear, splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter built into all Asynchronous Digital Subscriber Line **[*129]** ("ADSL") platforms. n255 The CLECs offered no contrary evidence. BellSouth should not be obligated to provide the CLECs with splitters when they are utilizing UNE-L and can readily provide this function for themselves. n256

n255 Fogle Rebuttal at pp. 8-9.

n256 *Id.*

The final area of competing contract language concerns CompSouth's proposed OSS language. The dispute between the parties is not over the language contained in the federal rules--clearly, the federal rules require BellSouth to make modifications to its OSS necessary for line splitting. The dispute between the parties revolves around the modifi-

cations that are actually "necessary." The CLECs presented no evidence to suggest that it is necessary for BellSouth to provide them with anything in order to facilitate line splitting.

The Florida Commission determined that BellSouth's language should be limited to when a CLEC purchases a stand-alone loop and that language in the interconnection agreement regarding line splitting should be revised to reflect **[*130]** that the requesting carrier is responsible for obtaining the splitter. The Florida Commission also found that indemnification should remain unaffected and that BellSouth is responsible for all necessary network modifications to accommodate line splitting. n257

n257 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The South Carolina Commission declined to require BellSouth to provide line splitting. n258 The North Carolina Commission determined that line splitting should be allowed on a commingled arrangement of a Section 251 loop and unbundled local switching pursuant to Section 271. n259

n258 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

n259 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission, therefore, finds that **[*131]** unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Section 3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

C. Fiber and Broadband Unbundling:

1. Greenfield and Fiber to the Home

i. Issue 23: Greenfield Areas: *a) What is the appropriate definition of minimum point of entry ("MPOE")? b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?*

ii. Issue 28: Fiber To The Home: *What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?*

There are essentially two disagreements regarding these issues. First, CompSouth wants to delete BellSouth's **[*132]** Section 2.1.2.3, which states:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval.

CompSouth did not offer any explanation for its desire to delete this provision, n260 which language appears reasonable on its face. The Commission, therefore, finds that this provision should appear in all interconnection agreements.

n260 *See* Fogle Rebuttal at p. 13.

[*133]

The second disagreement largely centers on the extent of fiber unbundling. The core dispute relates to the following language that CompSouth wants to substitute for BellSouth's proposed Section 2.1.2.3:

> Notwithstanding the above, nothing in this Section shall limit BellSouth's obligation to offer CLECs an unbundled DS 1 loop (or loop/transport combination) in any wire center where BellSouth is required to provide access to DS1 loop facilities. n261

CompSouth argues that its limitation is supported by the FCC's use of the terms "mass market" at various places in its orders. The Commission, however, finds that CompSouth's proposed language should be rejected because it is not supported by binding federal rules. n262

n261 *See* First Revised Exhibit JPG-1 at p. 53.

n262 *See 47 C.F.R. § 51.319(a)(3).*

The FCC has addressed fiber relief in various orders. In the *TRO,* for instance, the FCC stated at P 273:

> Requesting carriers are not impaired without access **[*134]** to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a pre-existing copper loop. With a limited exception for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only. Incumbent LECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops.

Although the FCC used the terms "mass market" at various other places in the *TRO,* it did not use those words in explaining the scope of its fiber relief, and the FCC was very clear that its "unbundling obligations and limitations for such loops do not vary based on the customer to be served." n263 The FCC recognized clearly that CLECs "are currently leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation." n264

n263 *TRO* at P 1210.

[*135]

n264 *TRO* at P 275.

The FCC extended its fiber relief in subsequent orders. In its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* n265 the FCC made clear that BellSouth is not required to unbundle fiber loops serving predominantly residential multiple dwelling units ("MDUs"). n266 The FCC also explained that, to the extent fiber loops serve MDUs that are predominantly residential in nature, such loops are governed by the FTTH rules. n267 "General examples of MDUs include apartment buildings, condominium buildings, cooperatives, or planned unit developments." n268 The FCC further stated that the existence of businesses in MDUs does not exempt such buildings from the FTTH unbundling framework established in the *TRO.* For instance, the FCC stated that "a multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground

floor is predominantly residential, while an office building that contains a floor of residential suites is not." n269 In its concluding paragraphs, the FCC acknowledged **[*136]** that its rule "will deny unbundling to competitive carriers seeking to serve customers in predominantly residential MDUs" but found that "such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy fiber to these buildings." n270

n265 CC Docket No. 01-338, FCC 04-191 (Aug. 9, 2004) (*"MDU Reconsideration Order"*).

n266 *MDU Reconsideration Order* at P 7.

n267 *Id.* at 4.

n268 *Id.* at P 4.

n269 *Id.*

n270 *Id.* at 23.

Following its *MDU Reconsideration Order,* the FCC next addressed the topic of fiber loops in its *Order on Reconsideration, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers ("FTTC Reconsideration Order").* n271 The FCC defined a FTTC loop as a "fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises." n272 Then, the FCC granted further unbundling relief, concluding that "requesting carriers are not impaired in greenfield **[*137]** areas and face only limited impairment without access to FTTC loops where FTTC loops replace pre-existing loops." n273 Significantly, the FCC reiterated that CLECs have increased revenue opportunities available with FTTC loops and that the entry barriers for CLECs and ILECs were "largely the same." n274 The FCC again concluded that its rule modification "will relieve the providers of such broadband loops from unbundling obligations under Section 251 of the Act." n275

n271 CC Docket No. 01-338, FCC 04-248 at PP 1, 9 (Oct. 18, 2004).

n272 *FTTC Reconsideration Order* at P 10.

n273 *Id.* at 11.

n274 *Id.* at 12.

n275 *Id.* at 32.

CompSouth's proposed contract language would require BellSouth to provide access to its FTTH or FTTC DS1 loops or DS1 EELs. The Commission, therefore, finds that CompSouth's proposed language must be rejected because it is inconsistent with FCC's broadband policies, its fiber orders, and the applicable rule. This finding is consistent with decisions of the Michigan, n276 **[*138]** Massachusetts, n277 and Rhode Island n278 Commissions. The Florida Commission determined that BellSouth is under no obligation to offer unbundled access to "Greenfield" FTTH/FTTC loops used to serve residential MDUs. It required BellSouth, in wire centers where impairment exists, to, upon request, unbundle the fiber loop to satisfy a DS1 or DS3 request. The Florida Commission also determined that unbundling requirements of an incumbent carrier with respect to overbuilt FTTH/FTTC loops are limited to either unbundled access to a copper loop or (if the ILEC elects to retire the copper loop) a 64 kbps transmission path over the FTTH/FTTC loop. n279

n276 *Michigan Order,* p. 6 - 7.

n277 *Massachusetts Arbitration Order,* p. 177.

n278 *Arbitration Decision,* In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Rhode Island to Implement the Triennial Review Order and Triennial Review Remand Order, Docket No. 3588, (November 10, 2005), p. 18.

n279 Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

[*139]

The Georgia Commission determined that the MPOE is either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. It also held that BellSouth is under no obligation to provide access to Greenfield FTTH or FTTC. The Georgia Commission adopted BellSouth's proposed language with a slight modification. It found that the FCC's FTTH/FTTC rules should apply to all central offices. n280

n280 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

The North Carolina Commission determined that BellSouth shall offer CLECs unbundled access to FTTH/FTTC loops serving enterprise customers and predominately business MDUs, and that in greenfield areas, BellSouth is under no obligation to provide access to unbundled FTTH/FTTC. The North Carolina Commission also determined that in the FTTH/FTTC overbuild situations where BellSouth also has copper loops, BellSouth shall make those copper loops available on **[*140]** an unbundled basis pursuant to the requirements of *47 C.F.R. § 51.319(a)(3)(iii)*. BellSouth's retirement of copper loops or copper sub loops must comply with the requirements of *47 C.F.R. § 51.319(a)(3)(iv)*. The North Carolina Commission added the caveat that if a loop is from an unimpaired wire center, it does not need to be provided. If, however, it is an impaired wire center, BellSouth has to provide it at TELRIC prices. n281

n281 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The South Carolina Commission adopted BellSouth's proposed language with one exception that being that DS 1 loops that are provisioned in impaired wire centers have to be provided at TELRIC prices. n282

n282 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[*141]

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.2, 2.1.2.1, 2.1.2.2, and 2.1.2.3, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

2. Issue 24: Hybrid Loops: *What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?*

Hybrid loops are defined in the federal rules, and BellSouth and CompSouth do not appear to contest that it is appropriate to include the language contained in such rules in interconnection agreements, whether that language is a shortened version of the rules, as BellSouth proposes, or the federal definition in its entirety. n283 BellSouth, however, opposes CompSouth's proposed language that would require BellSouth to provide access to hybrid loops as a Section 271 obligation. n284 Consistent with its decisions above, the Commission rejects this language and adopts BellSouth's proposed language. The Florida Commission found that BellSouth shall be required to **[*142]** provide CLECs with

nondiscriminatory access to the TDM features, functions and capabilities of a hybrid loop, including DS1 and DS3 capabilities under Section 251, where impairment exists, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an end user's premises. n285

n283 *See* Exhibits PAT-1 and PAT-2.

n284 Fogle Rebuttal at pp. 13-14.

n285 Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The Georgia Commission adopted BellSouth's language. n286 The South Carolina Commission also did, but with one exception that being that hybrid loops that are provisioned in impaired wire centers have to be provided at TELRIC prices. n287

n286 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006).

n287 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

[*143]

The North Carolina Commission found that a hybrid loop is a local loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. The North Carolina Commission determined that BellSouth shall provide unbundled access to hybrid loops pursuant to the requirements of *47 C.F.R. 51.319(a)(2)*. n288

n288 North Carolina Utilities Commission Docket P-55, Sub 1549 (March 1, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 2.1.3 shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

D. Routine Network Modification Issues

1. Issue 26: *What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?*

2. Issue [*144] 27: *What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates?* What is the appropriate language, if any, to incorporate into the ICAs?

3. MS Specific Issue: (a) *How should Line Conditioning be defined in the Agreement? What should BellSouth's obligation be with respect to Line Conditioning?* (b) *Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?* (c) *Under what rates, terms and conditioning should BellSouth be required to perform line conditioning to Revenue Bridge Taps?*

The parties' dispute centers on the relationship between routine network modifications ("RNM") and line conditioning. BellSouth argues that line conditioning is a subset of RNM, n289 and it opposes CompSouth's request to limit BellSouth's cost recovery to TELRIC rates, even if BellSouth performs work that it would not typically perform for its retail customers.

n289 Fogle Rebuttal at pp. 14-15.

[*145]

The FCC has defined RNMs as "those activities that incumbent LECs regularly undertake for their own customers." n290 RNMs do not include the construction of new wires (*i.e.* installation of new aerial or buried cable). n291 The FCC, citing the United States Supreme Court, has recognized an ILEC like BellSouth is not required to "alter substantially [its] network in order to provide superior quality interconnection and unbundled access." n292 Thus, an ILEC has to make the same RNMs to their existing loop facilities for CLECs that they make for their own customers. n293 As stated by the FCC:

> [b]y way of illustration, we find that loop modification functions that the incumbent LEC routinely performs for their own customers, and therefore must perform for competitors, include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer. n294

The FCC described these and other activities that would constitute RNMs as the "'routine, day-to-day work of managing an [incumbent LEC's] **[*146]** network'." n295

n290 *TRO* at P 632.

n291 *Id.*

n292 *TRO* at P 630 (quoting, *Iowa Util. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997)).*

n293 *TRO* at P 633.

n294 *Id.* at 634 (footnotes omitted).

n295 *Id.* at 637.

The D.C. Circuit in USTA II interpreted the FCC's RNM requirements in the TRO. The Court's analysis is consistent with BellSouth's position on this issue. The Court found that:

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. *The FCC has established a clear and reasonable limiting principle: the distinction between a 'routine network modification' and a 'superior quality' alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, tc'br its own customers.* While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes **[*147]** a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory. n296

Clearly, the FCC draws no distinction between line conditioning and RNM. In paragraph 643 of the TRO, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." n297 The FCC went on further to state that "incum-

bent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their Section 251(c)(3) nondiscrimination obligations." n298

n296 *USTA II, 359 F.3d at 578* (emphasis added).

n297 TRO at P 643.

[*148]

n298 *Id.*

In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules." n299 The FCC echoed these sentiments in paragraph 250 of the *TRO:*

> As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service. n300

n299 TRO at P 635.

n300 TRO at P 250.

The Florida Commission recently addressed this issue, finding that that BellSouth's RNM and line conditioning obligations were to be performed at parity. n301 Under this ruling, BellSouth is not obligated, to remove **[*149]** at TELRIC rates, load coils on loops greater than 18,000 feet. n302 Likewise, the Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. n303

n301 *See* Order No. PSC-05-0975-FOF-TP at 24 26.

n302 *Id.* at 36 37.

n303 *Id.* at 41.

With respect to Issue 27, BellSouth's position is that if BellSouth is not obligated to perform a RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC, it is a commercial or tariffed rate. n304 In contrast, CompSouth's proposed language limits BellSouth's recovery to TELRIC rates, even if the activity the CLEC is requesting was not included in the establishment of that rate. n305 The Commission finds that BellSouth's position is correct. If BellSouth performs non-standard modifications at the request of a CLEC, it is entitled to be compensated for doing so at rates other than TELRIC.

n304 Fogle Direct at p. 28.

[*150]

n305 Fogle Rebuttal at pp. 18-19.

The Florida and Georgia Commissions both concluded that BellSouth must provide the same routing network modifications and line conditioning that it normally provides for its own customers. n306

n306 Georgia Public Service Commission Docket No. 19341-U (February 7, 2006); and Florida Public Service Commission Docket No. 041269-TP (Order No. PSC-06-0172, March 2, 2006).

The South Carolina Commission concluded that line conditioning is not a routine network modification when a CLEC asks BellSouth to perform non-standard modifications to the network. The South Carolina Commission also determined that line conditioning is a part of routine network modifications for service that BellSouth normally furnishes to its own customers. Line conditioning for non-routine matters should be provided at a tariffed or commercial rate, whereas Routine Network Modifications, including routine line conditioning, should **[*151]** be provided at TELRIC rate. n307

n307 South Carolina Public Service Commission Directive Docket No. 2004-316-C (February 28, 2006).

The Commission, therefore, finds that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.10 and 2.5, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

IT IS THEREFORE ORDERED that unless a CLEC and BellSouth negotiate different language, BellSouth's proposed language addressing this issue as set forth in Appendix A to this Order, including without limitation Sections 1.10 and 2.5, shall be included in all interconnection agreements between BellSouth and CLECs operating in Mississippi.

IT IS FURTHER ORDERED that all interconnection agreements, including the rates for UNEs and services covered therein, impacted by the rulings in this Order shall be effective retroactive to March 11, 2006.

IT IS **[*152]** FURTHER ORDERED that this Order shall be effective immediately.

This Order shall be deemed issued on the day it is served upon the parties herein by the Executive Secretary of this Commission who shall note the service date in the file of this Docket.

Chairman Nielsen Cochran voted Aye Vice Chairman Leonard Bentz voted Aye; and Commissioner Bo Robinson voted Aye.

DATED this the 20<th> day of October, 2006.

MISSISSIPPI PUBLIC SERVICE COMMISSION

NIELSEN COCHRAN, CHAIRMAN

LEONARD BENTZ, VICE CHAIRMAN

BO ROBINSON, COMMISSIONER

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsU.S. Federal Communications Commission JurisdictionCommunications LawTelephone ServicesLocal Exchange CarriersTariffsCommunications LawTelephone ServicesMobile Communications Services

11 of 41 DOCUMENTS

LOUISIANA PUBLIC SERVICE COMMISSION
EX PARTE
CONSOLIDATED WITH
BELLSOUTH TELECOMMUNICATIONS
EX PARTE

ORDER NUMBER U-28131; Docket U-28141; ORDER NUMBER U-28356; Docket Number U-28356

Louisiana Public Service Commission

2006 La. PUC LEXIS 250

July 25, 2006, Ordered; May 25, 2006, Decided

SYLLABUS:

[*1] In re: Pursuant to Special Order 48-2004, Establishment of a Monitoring Docket to ensure Telecommunications Service Providers continue to honor their obligations under their approved interconnection agreements and to further ensure the carriers properly effectuate any changes to those interconnection agreements in accordance with the law, including, but not limited to, the change of law provisions in the interconnection agreements.
In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law.

PANEL: CHAIRMAN JAMES M. FIELD, DISTRICT II; VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, DISTRICT I; COMMISSIONER C. DALE SITTIG, DISTRICT IV; COMMISSIONER FOSTER L. CAMPBELL, DISTRICT V; COMMISSIONER LAMBERT C. BOISSIERE, III, DISTRICT III

OPINION: ***BACKGROUND***

These consolidated dockets were instituted as vehicles through which the Louisiana Public Service Commission ("LPSC", "Commission") could ensure that parties to interconnection agreements in Louisiana continue to honor their obligations under those agreements and properly effectuate changes to those agreements in accordance with changes in the law.

In recent years, the FCC has altered **[*2]** the list of unbundled network elements ("UNEs") which must be unbundled and made available by incumbent local exchange carriers ("ILECs") at cost-based rates under Section 251 of the Telecommunications Act. These changes have thrown the telecommunications industry into periods of uncertainty and are at the heart of these consolidated proceedings. Specifically, the Commission is being requested here to address changes resulting from the FCC's 2003 Triennial Review Order ("TRO") and the FCC's 2005 Triennial Review Remand Order ("TRRO") to the obligations of ILEC BellSouth Telecommunications, Inc. ("BellSouth") and competitive local exchange carriers ("CLECs") who have entered into interconnection agreements with BellSouth for the purpose of accessing and utilizing unbundled elements of BellSouth's network.

The parties to this proceeding have identified 25 issues to be considered and decided by the Commission. The issues arise from changes in the law effected by the FCC's TRO and TRRO and applicable to interconnection agreements and the unbundling of network elements. Specifically, the FCC announced changes to the unbundling obligations imposed upon ILECs. Noting its intent to encourage **[*3]** innovation and investment through "facilities-based competition," the FCC determined it appropriate to impose unbundling obligations "only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable facilities-based competition."

Pursuant to the procedural schedules adopted in the consolidated docket, BellSouth and the Intervenors (the CLECs) have presented their positions regarding the impact and implementation of the changes in the law and have

proposed language to be included in interconnection agreements concerning each of the identified issues. The Commission Staff has also submitted its position with regard to the issues identified by the parties.

On February 22, 2006, the Louisiana Commission, at its Business and Executive Session, asserted its primary jurisdiction pursuant to Rules 51 and 57 of the Commission's Rules of Practice and Procedure, with regard to one of the 25 issues identified by the parties to this proceeding. Specifically, in addressing Issue Number 8, the Commission ordered the following:

* declined to order BellSouth to include Section 271 elements **[*4]** in Section 252 agreements;
* declined to set rates for Section 271 elements;
* adopted BellSouth's proposed contract language with respect to Issue 8; and
* directed that any CLEC which files an enforcement action with the FCC regarding 271 elements shall provide a copy of the filing to the Commissioners so that the Commission may intervene and advise the FCC of its recommendation, if deemed necessary.

This vote resulted in the Issuance of Order No. U-28131, consolidated with Order No. U-28356

ALJ's RECOMMENDATION ON REMAINING ISSUES

Following the Commission's vote at its February 22, 2006 Business and Executive Session on Issue 8, 24 issues remained before the Administrative Law Judge. With respect to the remaining issues, the ALJ's Recommendations are as follows:

Issue Number 2

What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?

As a result of its reexamination of the unbundling obligations of ILECS, the FCC concluded in its TRRO that ILECs would no longer be required to **[*5]** unbundle local circuit switching, certain high capacity loops, dark fiber loops, and certain dedicated transport. Recognizing the significance of this change to the ILECs' existing CLEC customer base, the FCC established transition periods and transition pricing with regard to the conversion of the "de-listed" elements to alternative arrangements. The transition period for local switching, certain high capacity loops, and certain dedicated transport is 12 months -- ending on March 11, 2006. The transition period for dark fiber loops and transport is 18 months -- ending on September 10, 2006. Issue 2 concerns the implementation of this transition plan.

It is our conclusion that de-listed UNEs leased by a CLEC as of the effective date of the TRRO must be made available for lease by the CLEC at the established transitional rates throughout the applicable transition periods of 12 or 18 months. During the transition periods, CLECs and BellSouth are to take the necessary steps to convert all of the de-listed UNEs to alternative arrangements. However, the actual "transition" date, for purposes of the application of transitional rates, shall occur on the last day of the applicable transition **[*6]** period, at which point transitional rates shall no longer apply.

To the extent a CLEC migrates to other services offered by BellSouth, that migration at the end of the transition period may be reflected solely in a price change, which shall become applicable at the end of the transition period. If an amended interconnection agreement becomes effective after the transition period ends, the new rates applicable to de-listed UNEs supplied by BellSouth will be made retroactive to the date the transition period ended. No matter what choice a CLEC makes regarding a de-listed UNE -- to migrate to other services offered by BellSouth at market-based rates, to obtain comparable services from another telecommunications provider, or to utilize its own facilities -- BellSouth's obligation to provide the de-listed UNEs at the transition rates ends upon the end of the applicable transition period but not before.

We agree with the Commission Staff and the CLECs that interconnection agreements should provide for a transition period in the event of future UNE de-listings occurring when a wire center is determined to be unimpaired. We discuss wire center classifications and applicable procedures at [*7] Issue Number 5.

Further, with regard to transitional pricing of de-listed UNEs, we note that neither the TRRO nor the rules promulgated to implement the TRRO use "TELRIC rates" in the calculation of transitional rates. Instead, transitional rates are calculated by adding a margin (15% or $ 1.00) to the higher of whatever rate the requesting carrier paid for the element as of June 15, 2004, or the rate, if any, established by the state commission between June 16, 2004 and the effective date of the TRRO. Accordingly, interconnection agreements must conform to that pricing language.

Issue Number 3

(a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

(b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

The TRRO addresses implementation of the changes in law through use of the procedures outlined in Section 252 of the Telecommunications Act. That Section provides for the negotiation, [*8] arbitration, and State Commission approval of interconnection agreements between ILECs and CLECs:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.

Accordingly, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, upon the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein. Similarly, as both BellSouth and the CLECs suggest, it is appropriate that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which [*9] the parties have negotiated a different treatment.

Issue Number 4

What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport and how should the following terms be defined?

i. Business Line

ii. Fiber-Based Collocation

iii. Building

iv. Route

The TRRO establishes "tests" in the TRRO to determine whether or not BellSouth continues to have an obligation to provide high capacity loops and dedicated transport as unbundled network elements at cost-based rates. The tests are designed to indicate whether competitive provision of services is feasible in a wire center service area, based upon the number of business access lines and fiber-based collocators contained in the wire center. The FCC has determined that if a wire center contains threshold numbers of business lines and fiber-based collocators, impairment to CLECs no longer exists, and BellSouth's obligations change.

Accordingly, the TRRO adopts threshold counts of business lines and fiber-based collocators to determine the status of impairment at a wire center. For example, BellSouth is obligated to lease to **[*10]** a CLEC a DS1 loop to a building - as a UNE at cost-based rates - unless the building is served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center meets that threshold count of business access lines and fiber-based collocators, BellSouth no longer has the obligation to provide that DS1 loop at cost-based UNE rates. Similarly, BellSouth's obligation to provide DS3 loops as UNEs ends when a wire center meets a threshold count of at least 38,000 business lines and at least four fiber-based collocators.

With regard to dedicated transport, the threshold counts apply to the wire centers at either end of a requested transmission route. The wire centers are considered to be impaired -- and BellSouth has the obligation to provide the dedicated transport as a cost-based UNE -- if the wire center at either end of the route contains fewer than the threshold count of business lines or fiber-based collocators. Upon a determination that a wire center is a "Tier 1" wire center, in that it contains at least 38,000 business lines or four fiber-based collocators or both, BellSouth is no longer obligated to provide DS1 or DS3 dedicated transport **[*11]** as UNEs. Upon a determination that a wire center is a "Tier 2" wire center, in that it contains at least 24,000 business lines or three fiber-based collocators or both, BellSouth is no longer obligated to provide DS3 dedicated transport as a UNE. A wire center determined to be "Tier 3" meets none of these thresholds, and BellSouth remains obligated to provide dedicated transport as a UNE.

Business Line

In the TRRO, the FCC describes the impairment tests and thresholds it is putting into place with regard to the provision of high-capacity loops and dedicated transport, placing particular emphasis upon the presence and significance of numerous *business lines* to the wire center. In the regulations promulgated to implement the TRRO, the FCC provides a definition of the term "business line." That definition starts out by describing a "business line" as an ILEC-owned "switched access line used to serve a business customer." The second sentence of the definition starts: "The number of *business lines* in a wire center shall equal. . . ." And the third sentence refers to requirements of the *business line tallies*.

Clearly, the first sentence establishes the fundamental **[*12]** description of a business line -- an *ILEC-owned switched access line used to serve a business customer*. The remainder of the definition provides further particulars of *ILEC-owned switched access business lines* to be included in the count for purposes of establishing impairment at wire centers, but does not expand upon the fundamental description provided in the first sentence. To interpret the definition otherwise, as BellSouth does, placing emphasis on individual provisions without reference back to the first sentence, renders the definition internally inconsistent and completely at odds with the FCC's stated rationale of utilizing the presence of "business lines" as a test of impairment.

Fiber-Based Collocation

The briefs of the parties indicate that there is no dispute currently existing between them concerning the definition of fiber-based collocation.

Building

The term "building" has significance to BellSouth's obligation to provide high-capacity loops as unbundled network elements. The TRRO places "caps" on the number of DS1 and DS3 loops a requesting carrier may obtain from BellSouth to "any single building." The FCC has not provided a definition **[*13]** of the term "building."

The FCC provided no indication that the word "building" should be given other than its ordinary meaning; thus, it would appear appropriate to apply BellSouth's suggested "reasonable person" standard in determining what constitutes a "building." However, as the CLECs point out, the perspective of a reasonable person in the telecom industry might take into consideration factors whose significance would be unknown to someone outside the industry. Because the determination at issue here is of great significance to the telecommunications industry, we believe that it is entirely appropriate to consider the context in which the determination is being made.

Accordingly, we find that a determination of what constitutes a "building" must be made from a "reasonable person" perspective, but within the context of the telecom industry, and taking into account the FCC's purpose and rationale behind the determination. We believe that most "building" determinations will be quite obvious, while others will require consideration of various factors. For that reason, we do not believe it appropriate to announce one "all-purpose" rule applicable to such determinations. Should disputes **[*14]** arise in the future, the parties may petition the Commission for resolution on a case-by-case basis. If it becomes apparent that a more structured approach is necessary, we will

initiate a rule-making proceeding for the purpose of analyzing disputed issues in "building" determinations and promulgating appropriate rules to address those issues.

Route

"Route" is a term of significance to BellSouth's provision of dedicated transport to CLECs. "Route" is defined by the FCC regulations as

> a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

The TRRO requires an ILEC to unbundle dedicated transport between any pair of ILEC wire centers except where both wire centers **[*15]** defining the route are unimpaired wire centers. Thus, an ILEC must unbundle dedicated transport if a wire center at either end of a requested route is impaired. Both BellSouth and the CLECs voice concern over the possible manipulation of routes in order to accomplish a result that is unfair in the eyes of the other.

We decline to anticipate the hypothetical activity complained of by the parties and will defer any comment on the subject until such time as any party asserts an actual instance of an improper manipulation of routes. We defer to the FCC definition, which we believe makes clear that a "route" is defined by its end points, regardless of whether it passes through one or more intermediate wire centers or switches.

Issue Number 5

> **(a) Does the Commission have the authority to determine whether or not BellSouth's application of the FCC's Section 251 non-impairment criteria for high-capacity loops and transport is appropriate?**
>
> **(b) What procedures should be used to identify those wire centers that satisfy the FCC's Section 251 non-impairment criteria for high-capacity loops and transport?**
>
> **(c) What language should be included in agreements to reflect the procedures [*16] identified in (b)?**

There is no apparent dispute between BellSouth and the CLECs with regard to part (a) of this issue. Both sides agree that the Louisiana Public Service Commission is charged with resolving disputes arising under interconnection agreements and implementing changes to interconnection agreements necessitated by the TRRO. Thus, with regard to Issue Number 5, the Commission is asked only to resolve any disagreement among the parties concerning the appropriate procedures to be used to identify wire centers which satisfy the FCC's non-impairment criteria for high-capacity loops and dedicated transport.

The classification of wire centers as impaired or non-impaired is a matter of critical concern to telecommunications providers in Louisiana. Therefore, we believe it important that the classification of wire centers be handled in an open and efficient fashion -- in order to instill a sense of fairness and stability in the state's telecommunications market. We find that the annual filing procedure proposed by the CLECs provides, assuming some adjustments, an appropriate framework for a fair and efficient classification of wire centers. Such an annual filing would provide **[*17]** for a regular review of the status of wire centers in Louisiana, but would not preclude BellSouth from filing a request for wire center reclassification at any other time in the year as well.

Accordingly, we direct the Commission Staff to draft, with input from BellSouth and the CLECs, proposed procedural rules applicable to wire center determinations. The rules should provide a procedural framework within which any

disputed issues may be reviewed and resolved in a fair and efficient manner. We will consider the proposed rules at our next Business and Executive Session.

Although BellSouth has submitted its own determinations concerning the current impairment status of Louisiana wire centers, we believe that reliance solely on BellSouth's calculations would be inappropriate. Moreover, decisions made within this proceeding may alter BellSouth's calculations. Finally, we are uncertain of the impact of Hurricanes Katrina and Rita on the calculations previously conducted by BellSouth and how such impact should be addressed in the context of wire center classification. Nevertheless, to the extent BellSouth and the CLECs have no dispute with regard to the classification of certain wire centers, **[*18]** they shall jointly file, within fifteen (15) days of the effective date of this Order, a request for Commission approval of those wire center classifications. Upon the Commission's approval, the new classifications will go into effect.

Issue Number 6

Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?

Issue Number 6 poses another definition question. The federal regulations define a DS1 loop as "a digital local loop having a total digital signal speed of 1.544 megabytes per second." The very next sentence states that "DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including TI services."

What qualifies as a DS1 loop is significant, in that BellSouth has no obligation to provide a DS1 loop UNE from a non-impaired wire center. The definition is also significant to the calculation of "business lines" used to determine the classification of a wire center. For purposes of the "business line" count, the federal regulations direct that, with regard to digital access lines, each 64 kbps-equivalent shall be counted as one line. **[*19]** "For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" If an HDSL-capable copper loop is considered the equivalent of a DS1 loop, it will be counted as 24 "business lines."

We find that HDSL-capable copper loops are not the equivalent of DS1 loops. An "HDSL-capable copper loop" is nothing more than a copper loop facility which is *clear of equipment that could block* provision of high-bit rate digital subscriber line services. It should not be considered a DS1 loop for purposes of impairment unless electronics are added that permit the copper loop to provide a service featuring speeds of 1.544 megabytes per second.

We look to the basic thrust of the FCC's definition of a DS1 loop: "a digital local loop having a total digital signal speed of 1.544 megabytes per second." The regulation goes on to include, as DS1 loops, "two-wire and four-wire copper loops capable of providing high-bit rated digital subscriber line services." However, in order to make sense in the context of the overall definition of DS1 loops, that second sentence must be interpreted to include as DS1 loops *only* those two-wire or four-wire copper loops to which the **[*20]** necessary electronics have been added to permit the use of those copper loops for 1.544 mbps services.

Issue Number 9

What conditions, if any, should be imposed on moving, adding, or changing orders to a CLEC's respective embedded bases of switching, high-capacity loops and dedicated transport, and what is the appropriate language to implement such conditions, if any?

The TRRO's transition plans provide for 12 and 18-month transition periods during which CLECs may continue leasing de-listed UNEs, while taking steps to migrate from the de-listed UNEs to alternative facilities. The TRRO notes that the transition plans "shall apply only to *the embedded customer base*." Issue Number 9 concerns the definition of "embedded customer base," to which the transition plans apply and what changes to the embedded base are permissible during the transition periods.

Although the TRRO does not specifically define the phrase "embedded customer base," other provisions in the TRRO, as well as the federal regulations implementing the TRRO's transition period instructions, provide insight into the meaning to be assigned to that phrase. For example, the TRRO specifically instructs that **[*21]** the transition periods shall not permit competitive LECs to *add* new de-listed UNEs -- including new UNE-P arrangements, new high-

capacity loops, and new dedicated transport). Further, the TRRO provides that transition *pricing* is applicable to de-listed dedicated transport and high-capacity loops *that a CLEC was leasing as of the effective date of the Order*, but for which the Commission determines that no section 251(c) unbundling requirement exists. Similarly, the federal regulations implementing the TRRO provide that the transition periods apply to de-listed high-capacity loops and dedicated transport *that a CLEC was leasing as of the effective date of the TRRO*. We conclude from this language that the phrase "embedded customer base" is properly defined as the CLECs' base of leased UNEs as of the effective date of the TRRO. Accordingly, we concur with BellSouth's definition of "embedded customer base."

Addressing BellSouth's obligation to implement "add" orders related to the CLECs' embedded base of UNE arrangements during the transition period, we find that the TRRO clearly prohibits "adds" to the CLECs' base of leased de-listed UNEs during the transition period. **[*22]** We similarly conclude that "move" orders are also prohibited, in that such orders alter the CLECs' embedded UNE arrangements, to which the transition periods apply. Finally, there appears to be no dispute between the parties concerning BellSouth's implementation of "change" orders.

Issue Number 10

What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services and

(a) what is the proper treatment for such network elements at the end of the transition period; and

(b) what is the appropriate transition period, and what are the appropriate rates, terms and conditions during such transition period, for unbundled high capacity loops, high capacity transport, and dark fiber transport in and between wire centers that do not meet the FCC's non-impairment standards at this time, but that meet such standards in the future?

The parties agree that the concerns presented in Issue Number 10 are largely addressed in the discussion of other issues in this proceeding, particularly Issues 2 and 5. The question remaining **[*23]** under Issue Number 10 concerns the process by which UNEs which were de-listed by the 2003 TRO, but for which the FCC has provided no specific transition plan, should be converted to alternative arrangements. It appears that the parties generally concur in a process by which BellSouth shall provide written notice to CLECs who still have rates, terms, and conditions for these de-listed UNEs in their interconnection agreements. The affected CLECs shall then have thirty (30) days to submit orders to disconnect or convert the de-listed UNEs to other arrangements.

We approve of this process, as it provides for fair notification to the CLECs and fair opportunity for the CLECs to submit orders to disconnect or convert. We further concur with the CLECs' proposal that BellSouth be required to provide, in the written notice, specific identification of the service agreements or services which must be disconnected or converted. We also concur with BellSouth's proposal that to the extent the CLEC requests BellSouth to convert the de-listed UNE to alternative arrangements, BellSouth shall be permitted to assess non-recurring charges associated with that conversion. Finally, if a CLEC disputes BellSouth's **[*24]** identification of UNEs which must be disconnected or converted, the CLEC shall send written notice of its dispute, within thirty (30) days of BellSouth's notice. BellSouth shall not disconnect the disputed UNEs while the dispute is being resolved. If the parties are unable to reach a voluntary resolution of the dispute, they may petition the Commission for assistance.

Issue Number 11

What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?

The questions posed in Issue Number 11 are addressed under Issue Number 2.

Issue Number 13

Should network elements de-listed under section 251(c)(3) be removed from the SQM/PMAP/SEEM?

The SQM/PMAP/SEEM performance measurements were instituted to confirm and monitor BellSouth's compliance with its obligations under Section 271 of the Telecommunications Act to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251 of the Act. These performance measurements **[*25]** were established in conjunction with BellSouth's request for entry into the in-region interLATA market pursuant to Section 271. If BellSouth fails to meet the established performance measurements, it must pay a monetary penalty to the CLEC or the State. Because the FCC has de-listed some of the Section 251 network elements on which BellSouth was required to report, BellSouth contends that reporting on those elements is no longer appropriate or fair.

We decline to reach a decision on this issue in this proceeding. We believe that the questions raised here would be more appropriately addressed in Docket U-22252 (Subdocket C) "In Re: BellSouth Telecommunications, Inc. Service Quality Performance Measurements."

Issue Number 14

What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in the Interconnection Agreements to implement commingling (including rates)?

In this proceeding, BellSouth and the CLECs disagree on whether BellSouth has an obligation to implement at the request of a CLEC the commingling of unbundled Section 251 network elements with unbundled Section 271 network elements. With the FCC's de-listing of **[*26]** certain Section 251 UNEs, this question has become very important to CLECs who hope to continue their provision of services by commingling still available Section 251 UNEs with Section 271 UNEs. The definition provided for "commingling" in the federal regulations refers to the linking of a UNE or UNE combination to one or more services that a CLEC has obtained "at wholesale" from an ILEC. The federal regulations place an obligation upon ILECs to "perform the functions necessary to commingle" UNEs and UNE combinations with "one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale" from an ILEC. While there is no dispute among the parties that Section 271 checklist network elements are "wholesale facilities and services," BellSouth suggests that the TRO *excludes* Section 271 network elements from the list of "wholesale" services and facilities which may be commingled.

From our overall reading of the TRO, Errata, and federal regulations, we discern no intent by the FCC that Section 271 elements are to be excluded from the "wholesale" facilities and services which CLECs are permitted to commingle with UNEs and UNE combinations. The FCC **[*27]** could easily have stated its intent to exclude Section 271 elements, but, in fact, did not. Moreover, the FCC deleted a sentence from the TRO which would have accomplished such an exclusion. Accordingly, we conclude that the "wholesale" facilities and services available for commingling with UNEs and UNE combinations include services available only pursuant to Section 271.

We have declined, in this proceeding, to order BellSouth to include Section 271 elements in interconnection agreements; thus, it is unclear at this time what Section 271 elements will be "available" for commingling purposes. Therefore, we are unable to make any conclusions concerning the nature of commingling arrangements which might be available to CLECs using Section 271 elements.

Issue Number 15

Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?

There appears to be little dispute between the parties on this issue. The TRO provides that a CLEC may convert UNEs and UNE combinations to wholesale services and may convert wholesale **[*28]** services to UNEs and UNE combinations, so long as the CLEC meets the applicable eligibility criteria. BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions -- but not with regard to conversion rates. The CLECs object to the rates proposed by BellSouth and contend that new conversion rates must be established through a proceeding allowing for discovery and cross-examination. The CLECs propose that the conversion rate currently applicable to EEL conversions should be utilized until new conversion rates have been approved in proceeding initiated for that purpose.

As BellSouth and the CLECs have apparently reached agreement with regard to applicable terms and conditions for such conversions -- but not with regard to conversion rates, we address only the rate issue. The TRO instructs that any charges assessed by ILECs in connection with these conversions must be just, reasonable, and nondiscriminatory. The record in this proceeding is insufficient for the purposes of determining whether the rates proposed by BellSouth are just, reasonable, and nondiscriminatory. Accordingly, we conclude that if the parties are unable **[*29]** to reach agreement on applicable conversion rates, BellSouth shall file proposed rates with the Commission and initiate a rate proceeding.

Issue Number 16

What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?

We find that this issue should more appropriately be addressed in the rate proceeding to be initiated pursuant to our conclusions in Issue Number 15.

Issue Number 17

Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

Line sharing is defined in the federal regulations as

> the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop.

As part of the new unbundling rules announced in the FCC's TRO, ILECs were relieved of the obligation to make available as UNEs the **[*30]** high frequency portion of the loop for line sharing purposes pursuant to Section 251. However, the FCC determined that the requirements of Section 271(c((2)(B), which are the requirements which a Bell Operating Company must meet in order to provide in-region interLATA (long distance) services, establish an independent obligation for Bell Operating Companies to provide access to network elements, regardless of the unbundling analysis under Section 251.

In Docket U-28027, a petition for arbitration of an interconnection agreement between BellSouth and DIECA Communications, Inc. d/b/a Covad Communications Company, this Commission issued an Order on January 13, 2005, finding that BellSouth has a continuing obligation to provide line sharing under Section 271 unless that obligation was removed as a result of a petition for forbearance filed by BellSouth with the FCC. On January 18, 2006, the Commission voted to approve a ruling by the administrative law judge that the FCC Forbearance Order issued in response to BellSouth's petition did not relieve BellSouth of its Section 271 line sharing obligations. Recently, on February 22, 2006, the Commission rejected the administrative law judge's **[*31]** recommendation in U-28027 that the Commission has jurisdiction to set rates for Section 271 line sharing within the context of the arbitration.

Thus, within Docket U-28027, this Commission determined that BellSouth has a continuing Section 271 obligation to provide line sharing. However, the Commission rejected a finding that it had jurisdiction to set rates for Section 271 line sharing for purposes of that arbitration. When the Commission took up Issue Number 8 in this proceeding at its February 22, 2006 Business and Executive Session, it announced no specific decision concerning its jurisdiction over Section 271 obligations and rates; however, the Commission voted to *decline* to order BellSouth to include Section 271 elements in Section 252 interconnection agreements and voted to *decline* to set rates for Section 271 elements.

Accordingly, as previously concluded in our Order 28027, we have answered in the affirmative to Issue Number 17 -- that BellSouth does have a continuing Section 271 obligation to provide line sharing. However, in accordance with our decision at the February 22, 2006 Business and Executive Session, we decline to order BellSouth to include Section 271 **[*32]** elements in interconnection agreements and we decline to set rates for such elements.

Issue Number 19

What is the appropriate ICA language to implement BellSouth's obligations with regard to line splitting?

The federal regulations define *line splitting* as

> the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

The regulations require ILECs to provide to CLECs leasing an unbundled copper loop the ability to engage in line splitting arrangements with another CLEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. ILECs are also required to make all necessary network modifications for loops used in line splitting arrangements. The dispute between the parties concerning line splitting concerns whether line splitting can involve the commingling of 251 and 271 elements and whether BellSouth must provide the CLECs with splitters.

We need not address whether line splitting can involve the commingling of 251 **[*33]** and 271 elements, in light of our February 22, 2006 decision -- declining to order BellSouth to include Section 271 elements in Section 252 agreements.

With regard to provision of the splitter, we look to the TRO and its discussion of line splitting. The FCC notes in section 251 of the TRO that

> The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office. We reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules.

The TRO goes on to describe some of the line splitting-specific rules being adopted. The TRO makes no mention, however, of any new rule regarding provision of the splitter. We conclude that, since the TRO refers to existing rules which provide that the CLEC shall provide its own splitter, and since the TRO makes no reference to a change in that rule, the obligation to provide a splitter remains with the CLEC.

Issue Number 22

What is the appropriate ICA language, [*34] if any, to address access to call related databases?

This issue arises from the CLECs' contention that BellSouth continues to have a Section 271 obligation to provide access to call related databases, despite changes in BellSouth's unbundling obligations pursuant to Section 251. Bell-

South disputes the CLECs' contention. We need not address whether BellSouth continues to have a Section 271 obligation to provide access to call related databases, in light of our February 22, 2006 decision -- declining to order BellSouth to include Section 271 elements in Section 252 agreements.

Issue Number 23

(a) What is the appropriate definition of minimum point of entry ("MPOE")?

(b) What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE") of a multiple dwelling unit that is predominately residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation?

Issue Number 28

What is the appropriate language, if any, to address access to overbuild [*35] deployments of fiber to the home and fiber to the curb facilities?

These two issues concern the FCC's unbundling obligations for fiber loops, including fiber to the home loops ("FTTH") and fiber to the curb loops ("FTTC"). A fiber to the home loop consists entirely of fiber optic cable serving an end user's customer premises or a multiunit premises' minimum point of entry. A fiber to the curb loop consists of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or a multiunit premises' minimum point of entry.

As a result of the TRO's unbundling rules, an ILEC's obligation to provide nondiscriminatory unbundled access to fiber to the home and fiber to the curb loops has been significantly limited. ILECs are no longer required to provide these fiber loops to an end user's customer premises which has not been served by an loop facility (a new build), or when the ILEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility (an overbuild).

BellSouth and the CLECs have only one fundamental disagreement concerning the unbundling of fiber loops, and that disagreement concerns the customer **[*36]** groups to which the rules apply. We conclude that the unbundling rules for fiber to the home and fiber to the curb loops are applicable to the provisioning of these loops in all customer markets.

Issue Number 24

What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?

A *hybrid loop* is defined in the federal regulations as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." Pursuant to the regulations, an ILEC is not required to provide unbundled access to the "packet switched features, functions and capabilities of its hybrid loops." The parties have raised no concerns with regard to this definition or unbundling rule. However, BellSouth objects to the CLECs proposal of language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation. We will not address proposed language which would require BellSouth to provide access to hybrid loops as a Section 271 obligation in light of our February 22, 2006 decision, declining to order BellSouth to include Section 271 elements in Section 252 **[*37]** interconnection agreements.

Issue Number 26

What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Issue Number 27

What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Issues 26 and 27 concern BellSouth's obligation to provide routine network modifications. A *routine network modification* is defined in the federal regulations as "an activity that the incumbent LEC regularly undertakes for its own customers." ILECs are required by the regulations to make all routine network modifications to unbundled loop facilities used by a CLEC and to unbundled dedicated transport facilities used by a CLEC.

Line conditioning is defined in the federal regulations as "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber **[*38]** line service." The federal regulations require ILECs to condition a copper loop at the request of a CLEC, and ILECs may recover their costs for such conditioning under TELRIC prices. BellSouth and the CLECs disagree on the relationship between routine network maintenance obligations and line conditioning obligations. BellSouth considers line conditioning to be a subset of routine network maintenance obligations, while the CLECs maintain that line conditioning imposes requirements on BellSouth which are separate and distinct from its network maintenance obligations.

We conclude that line conditioning obligations and routine network maintenance obligations exist as separate ILEC requirements. We concur with the Commission Staff's suggestion that interconnection agreements should include the specific language contained in the federal regulations describing line conditioning and routine network maintenance obligations. Disagreements with regard to BellSouth's obligations under either category of obligations may be submitted to the Commission for arbitration. To the extent BellSouth wishes to assess charges for costs it claims are not already recovered in Commission-approved recurring **[*39]** or non-recurring rates, we concur with the CLECs' position that BellSouth must file a rate application and supporting documentation with the Commission and obtain approval.

Issue Number 29

What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

The FCC permits CLECs to convert special access circuits to unbundled combinations of loop and transport, known as EELs (Extended Enhanced Links) through a self-certification process. The CLECs are permitted to self-certify that they satisfy the qualifying service eligibility criteria for high-capacity EELs. ILECs must accept the self-certifications, but they have given limited audit rights, in accordance with which they may audit a CLEC's compliance with qualifying service eligibility criteria. This issue concerns the process by which such audits may be conducted. The parties here have not reached agreement on implementing language.

The TRO is fairly specific concerning the auditing process to be implemented. In light of the parties' failure to reach agreement as to the language to be used in interconnection agreements, we direct that they utilize the specific wording utilized in **[*40]** the TRO to describe the process -- with the following additional instructions. We note, first, the FCC's stated intent, in Section 622 of the TRO, that the auditing process is to be based "upon cause." Accordingly, the audit process shall begin with written notice to the CLEC, at least thirty (30) days prior to the start of the audit, which notice shall contain BellSouth's specific allegations of non compliance, shall include a listing of the particular circuits for which BellSouth alleges noncompliance, and shall be accompanied by all supporting documentation. Second, in order to ensure the independence of the auditor, BellSouth shall also provide in its written notice a list of three auditors from which the CLEC may choose one to conduct the audit.

Issue Number 31

What language should be used to incorporate the FCC's *ISP Remand Core Forbearance Order* into interconnection agreements?

We concur with the CLEC's proposal that the FCC's ISP Remand Core Forbearance Order may be reasonably incorporated into interconnection agreements by deleting all references to "new markets" and "growth cap" restrictions. Such revisions shall be accomplished along with other amendments **[*41]** resulting from our decision in this proceeding.

Issue Number 32

How should the determinations made in this proceeding be incorporated into existing Section 252 interconnection agreements?

As provided in Issue 3, ILECs and CLECs whose interconnection agreements are impacted by the changes in law addressed in this proceeding must move promptly, upon the effective date of the Order in this proceeding, to execute amendments to those interconnection agreements to effect the Commission's decisions here. It appears that there is no disagreement between BellSouth and the CLECs on that point. The CLECs and BellSouth are directed to initiate that process by submitting to the Commission Staff for approval, within sixty (60) days of the effective date of this Order, language which implements the decisions contained herein.

We further direct that all pending arbitration proceedings shall be bound by the decisions of the Commission in this proceeding, except with regard to issues as to which the parties have negotiated a different treatment.

Finally, we direct that the decisions reached herein shall have general applicability to interconnection agreements in Louisiana, except with **[*42]** regard to issues as to which the parties have negotiated a different treatment.

COMMISSION'S CONSIDERATION OF THE ALJ'S RECOMMENDATION

The ALJ's Recommendation, as well as Motions for Reconsideration of Order No. U-28131, consolidated with U-28356 filed by Covad and CompSouth, were considered by the Commission at its May 25, 2006 Business and Executive Session. On motion of Commissioner Sittig, seconded by Commissioner Field, and unanimously adopted, the Commission voted that Covad's Motion for Reconsideration or, alternatively, for Stay be denied as moot in light of the Commission's stay order issued in Docket U-28027. With respect to the Motion for Reconsideration filed by the Competitive Carriers of the South ("CompSouth"), the Commission will hold in abeyance CompSouth's Motion. The core jurisdictional issues raised in CompSouth's Motion are currently before the federal district courts in Georgia and Missouri. A ruling on the Motion will thus be deferred until there is further guidance from the federal courts or FCC. The deferral will not suspend the effect of the order.

With respect to the ALJ's Recommendation, the Commission voted as follows: On motion of Commissioner **[*43]** Blossman, seconded by Commissioner Sittig, and unanimously adopted, the Commission voted to accept the ALJ's recommendation with the following modifications: On Issues 4 and 5: The FCC's definition of business lines should be interpreted to include all UNE-L lines and digital access lines at full capacity. Further, BellSouth shall file no later than 10 days from the date of the Order a list of all wire centers that meet the FCC's non-impairment standards. Two wire centers proposed to be de-listed are in the New Orleans area which was affected by Hurricane Katrina. These wire centers should not be evaluated according to the data submitted in this docket. These wire centers should be evaluated based on the future wire centers de-listing procedure the Commission adopts. For wire centers that do not currently meet the non-impairment standards, but may at some point in the future, the Commission adopts the Staff's proposal that BellSouth shall provide notice of such newly de-listed wire centers to all CLECs and the Commission Staff and further that the CLECs shall have the right to dispute such filings, and any dispute regarding the proposed de-listing of a wire center will be resolved **[*44]** by the Commission. For newly de-listed wire centers not subject to dispute, the CLECs shall have 90 days from the notice to implement changes to the affected customer base. With respect to Issue 14: This Commission finds that BellSouth's commingling obligations include Section 271 elements. However, as this Commission has previously ruled it has no jurisdiction to include Section 271 elements in Section 252 agreements, or to set Section 271 rates, commingling agreements shall be included in non-252 agreements pending the Commission's resolution of CompSouth's Motion for Reconsideration. With respect to Issue 23(b): BellSouth is required to unbundle Fiber-to-the-Home (FTTH) and Fiber-to-the-Curb (FTTC) loops predominantly commercial Multi-Dwelling Units (MDUs), but

has no obligation to unbundle such fiber loops to predominantly residential MDUs. While the FCC's rules provide that FTTH and FTTC loops serving end user customer premises do not have to be unbundled, CLEC access to unbundled DS1 and DS3 loops was also preserved. Accordingly, in wire centers in which a non-impairment finding for DS1 and DS3 loops has not been made, BellSouth is obligated upon request to unbundle a FTTH and **[*45]** FTTC loop to provide a DS1 or DS3 loop.

IT IS THEREFORE ORDERED THAT:

1. Covad's Motion for Reconsideration or, alternatively, for Stay of Order U-28131, consolidated with U-28356, is denied as moot in light of the Commission's stay order issued in Docket U-28027.

2. CompSouth's Motion for Reconsideration will be held in abeyance. A ruling on the Motion will be deferred until there is further guidance from the federal courts or FCC. The deferral will not suspend the effect of the order.

3. The ALJ's Recommendation, as contained herein, is adopted, with the following modifications: With respect to Issues 4 and 5, The FCC's definition of business lines should be interpreted to include all UNE-L lines and digital access lines at full capacity. Further, BellSouth shall file no later than 10 days from the date of the Order a list of all wire centers that meet the FCC's non-impairment standards. Two wire centers proposed to be de-listed are in the New Orleans area which was affected by Hurricane Katrina. These wire centers should not be evaluated according to the data submitted in this docket. These wire centers should be evaluated based on the future wire centers de-listing **[*46]** procedure the Commission adopts. For wire centers that do not currently meet the non-impairment standards, but may at some point in the future, the Commission adopts the Staff's proposal that BellSouth shall provide notice of such newly de-listed wire centers to all CLECs and the Commission Staff and further that the CLECs shall have the right to dispute such filings, and any dispute regarding the proposed de-listing of a wire center will be resolved by the Commission. For newly de-listed wire centers not subject to dispute, the CLECs shall have 90 days from the notice to implement changes to the affected customer base. With respect to Issue 14, the Commission finds that BellSouth's commingling obligations include Section 271 elements. However, as this Commission has previously ruled it has no jurisdiction to include Section 271 elements in Section 252 agreements, or to set Section 271 rates, commingling agreements shall be included in non-252 agreements pending the Commission's resolution of CompSouth's Motion for Reconsideration. With respect to Issue 23(b), BellSouth is required to unbundle Fiber-to-the-Home (FTTH) and Fiber-to-the-Curb (FTTC) loops predominantly commercial Multi-Dwelling **[*47]** Units (MDUs), but has no obligation to unbundle such fiber loops to predominantly residential MDUs. While the FCC's rules provide that FTTH and FTTC loops serving end user customer premises do not have to be unbundled, CLEC access to unbundled DS1 and DS3 loops was also preserved. Accordingly, in wire centers in which a non-impairment finding for DS1 and DS3 loops has not been made, BellSouth is obligated upon request to unbundle a FTTH and FTTC loop to provide a DS1 or DS3 loop.

4. This Order shall be effective immediately.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

July 25, 2006

DISTRICT II

CHAIRMAN JAMES M. FIELD

DISTRICT I

VICE CHAIRMAN JACK "JAY" A. BLOSSMAN

DISTRICT IV

COMMISSIONER C. DALE SITTIG

DISTRICT V

COMMISSIONER FOSTER L. CAMPBELL

DISTRICT III

COMMISSIONER LAMBERT C. BOISSIERE, III

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